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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Appeals for the State of West Virginia, Charleston, West Virginia

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ray Crookham of Mason County, West Virginia, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia, entered on the 10th day of March, 1959, reversing the judgment of the trial court of Mason County, West Virginia, in favor of the petitioner, an injured railway employee, on a finding of fact made by a jury in a Federal Employers' Liability Act case, by which decision the Supreme Court of Appeals of West Virginia set aside a verdict of a jury, and granted a new trial, and remanded to the trial court.

The Supreme Court of Appeals of West Virginia, denied petitioner his right of a trial by jury guaranteed

by the Constitution and given him by Congress under the Federal Employers' Liability Act (45 USCA Sec. 51, et seq) by disregarding all findings of the jury, both in an answer to a special interrogatory, *decided adversely to the defendant*, and a general verdict, in the plaintiff's favor, made on conflicting evidence, thus denying to the petitioner his rights under the State and Federal Constitutions. The Supreme Court of Appeals of West Virginia refused on April 6, 1959, an application for a rehearing.

OPINIONS OF THE COURTS BELOW

The opinion of the trial court, in favor of the petitioner on the defendant's motion to set aside the verdict of the jury, is unreported and is set out in the appendix to this petition. (Appendix p. 3a)

The opinion of the Supreme Court of Appeals of West Virginia, handed down on March 10, 1959, reported in 107 S.E. 2d 516, but unreported in the West Virginia reports to date, is set out in the appendix to this petition. (Appendix p. 6a) Petition for rehearing was timely made and denied on April 6, 1959, as shown by order set out in the appendix of this petition. (Appendix p. 18a). On April 7, 1959, a motion was made before the Supreme Court of Appeals of West Virginia, pursuant to Chapter 58, article 5, section 31 of the Code of West Virginia, to stay the mandate of the Court for the purpose of making application to this Court for a writ of certiorari, which motion was granted as indicated by an order set out herein. (Appendix p. 19a), and the bond requirement as set out in said order has been compiled with as indicated by a certificate of the clerk of the circuit court of Mason County, West Virginia, also made a part hereof. (Appendix p. 20a)

JURISDICTION

1. Jurisdiction to grant the prayer of this petition is sustained by title 28 USCA Sec. 1257 (sub-section 3).

2. The United States statutes applied by the Supreme Court of Appeals of West Virginia was 45 USCA 51-59 and 51 U.S.C. 51 to 59.

3. Judgment of the Supreme Court of Appeals of West Virginia was rendered against the petitioner on the 10th day of March, 1959. Rehearing was denied on the 6th day of April, 959.

4. The Supreme Court of Appeals of West Virginia is the highest court of that state in which decision could be rendered within the meaning of 28 USCA 1257.

W. Va. Constitution Art. VIII, Sec. 1

Harbert v. *County Court*, 129 W. Va. 54. 39 S. E. (2d) 177

W. Va. Northern Ry. Co. v. *George Pritt*, 336 U.S. 961, 69 S. Ct. 891, 93 L. Ed. 1113

QUESTIONS PRESENTED

The question presented is whether the Supreme Court of Appeals of West Virginia in disregarding all the issues passed upon by the jury, both on a special and general verdict, in favor of the injured employee, and in the setting aside the judgment of a trial court, rendered in favor of the injured employee, had deprived the injured employee of the right of trial by jury given him under a Federal Statute, generally known as the Federal Employers' Liability Act, and under the Constitution of the United States, Article VII Section 2 and Article VII of the Amendments to the aforesaid Constitution.

STATEMENT OF FACTS

Petitioner, Ray Crookham, sixty three years of age, and employed for forty two years by respondent in railroad work as a section hand, sustained permanent and totally disabling injuries, on the 28th day of December, 1955, while engaged in the work of his employer incident to the removing and loading (without tie tongs) of water soaked cross ties as a part of the discontinuing of a passing track, then a part of respondent's main railroad line. The customary method of lifting ties from the ballast bed was by the use of tie tongs, so construed (for safety reasons) to make it impossible for any number of men less than four to lift a cross tie (See picture of tongs, R. 259-261). On the date of the injury, the railroad foreman with only two pairs of regularly used tie tongs on the job (R. 228) sent four men, including the petitioner here, to a work site about one hundred and twenty five rods away, to remove ties from a passing track bed, but did not request or suggest the use of tie tongs. Arriving at the work site, the four men found that they were to load an old fashioned high bedded, non-dump truck, the bed of which stood four feet above the ground (the ordinary bed stands three feet above the ground) without tongs. The foreman did not accompany these men to the job, but remained with three other men building a fence—a non-hazardous work. Respondent normally furnished its own commercial dump truck, (R. 48), the bed of which stood only three feet above the ground, and the height of the rear part of the bed could be lowered by hydraulic lift (R. 49). After hand loading had progressed for a short time the ties piled up on the back of the truck and interfered with further loading. By necessity one member of the four men left his crew and went to the truck to assist the owner (not a railroad employee) in rolling

back and placing the ties, a practice, had a foreman then been present, would not likely have permitted. The man who left the job was Crookham's work buddy and Crookham's lifting burden and strain was from that time forward substantially increased—many times doubled. The loading of ties continued from 9:45 A.M. to 2:30 P.M. with, in the main, a three man crew, (R. 54) during which time 80 heavy, water-soaked cross ties were dug (by the help of a bar only) from their water-soaked bed and lifted by hand to the truck bed, and to each increased elevation as the ties piled up. These ties weighed from 125 to 225 pounds each (R. 140, 195, 223).

The customary method of lifting and loading ties, was for two men to lift one end of a tie with a set of tongs (a set of tongs consisted of one pair with two lifting handles—much like a pair of cutting scissors) and two other men to lift the other end with another set (or pair) of tongs. That such is the accepted method is admitted by foreman Whittington when he answered in the affirmative this question: "It takes four men to load ties?" (R. 227). If it took four men to load ties; two sets (or pairs) of tongs would be needed. Yet foreman Whittington admits there were only two pairs of tongs on the job. (R. 228)

Q. "Now didn't you testify here yesterday that you have only two pairs of tongs on the truck or job?"

A. "Yes."

Simultaneously with the loading of ties, foreman Whittington and his three men were using one pair of tongs at another place on the job as indicated by this question and answer:

Q. "How did you get the ties over to the post holes?"

A. "Pair of tongs." (R. 228)

Therefore, it must be concluded that tie tongs were not furnished to the petitioner because they were not available, which is an act of negligence.

While in the act of lifting one end of a heavy, water-soaked tie, Crookham felt, (simultaneously with the lift) a burning sensation in one of his eyes. (R. 55). After finishing his lift, petitioner asked the crew to wait long enough to permit him to remove his glasses and examine his eye. (R. 55). He discovered his vision was blurred (R. 56-57)—no evidence disputed this. This was the first notice of impaired vision. Later, he submitted himself to the hospital and was told he had a large detachment of the retina extending over the infero-temporal half of the retina. An operation on the eye and long periods of hospitalization followed. This injury resulted in a substantial and permanent loss of the sight of the petitioner's left eye. He has never worked since. (R. 104)

The negligence acts charged are:

1. In not furnishing and supplying a foreman to go with and supervise the four men crew in loading ties.

2. In not furnishing petitioner with sufficient number of safety tie tongs (designed so that no number of men less than four could use the same) customarily used in handling and loading ties. (a fact found by the jury).

3. In requiring an employee in the absence of a foreman to load by hand an old fashioned, high bedded non-dump truck (standing four feet high) instead

of an ordinary truck (three feet high) with heavy water-soaked ties.

4. To permit the work buddy of Ray Crookham to leave the job to assist the truck owner in rolling back ties being loaded on his truck, thus increasing the lifting load and the burden upon the petitioner.

The case came on in the lower court on the 20th day of May, 1957, and at the conclusion of the three day trial, was submitted to the jury upon the instructions of both parties, and on a *special interrogatory propounded by the defendant itself.* This interrogatory asked the jury: "Should the section crew have used tie tongs to load the ties on the Sayre truck?" The jury returned a general verdict for the plaintiff and assessed his damages at $12,500.00, and *replied to the special interrogatory in the affirmative.* Thus, we have a general and a special verdict by the jury in the petitioner's favor.

A motion was made by defendant to set aside the verdict and argued in vacation of the trial court. The trial court handed down a written opinion (Appendix p. 3a) in which it stated, in effect, that the jury found the defendant was negligent in not furnishing tie tongs to be used in lifting the ties, and (2) that the "jury also could have found that it was negligent in not sending a foreman along with the four men engaged in a new and different kind of work . . ." (R. 17) (Appendix p. 3a)

Judgment was entered on the verdict and the defendant applied to the Supreme Court of Appeals of West Virginia, for a writ of error, which was granted. The case was set on the docket, and after oral argument and the filing of written briefs, said court of appeals set aside the jury verdict and granted the defendant a new trial. (See Court's decision in appendix to petition p. 6a)

Petitioner contends that the Supreme Court of Appeals of the State of West Virginia in reaching this decision ruled contrary to the trial court, to the former decisions of the West Virginia Supreme Court of Appeals, and to the law propounded by this Court.

Stone v. *N. Y. C. & St. L. R. Co.* 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358

Rogers v. *Missouri Pac. R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443

Webb v. *Illinois Central R. Co.* 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451

Ferguson v. *Moore-McCormack Lines, Inc.* 352 U. S. 521, 1 L. Ed. 2d, 511, 77 S. Ct. 457

Deen v. *Gulf, C. & S.F. Ry. Co.* 353 U. S. 925, 1 L. Ed. 2d 721, 77 S. Ct. 715

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Arnold v. *Panhandle & S.F. Ry. Co.*, 353 U. S. 360, 1 L. Ed. 889, 77 S. Ct. 840

Ringhiser v. *Chesapeake & O. Ry. Co.*, 354 U. S. 901, 1 L. Ed. 2d 1238, 77 S. Ct. 1093

Gibson v. *Thompson, Trustee*, 355 U. S. 18, 2 L. Ed. 2d 1, 78 S. Ct. 2

Ferguson v. *St. Louis-San Fran. Ry. Co.* 356 U. S. 41, 2 L. Ed. 2d 571, 78 S. Ct. 671

Moore v. *Terminal Ry. Co.* 3 L. Ed. 2d 24

Walls v. *McKinney*, 139 W. Va. 866, 81 S.E. 2d 901

Pritt v. *W. Va. N. R. R. Co.* 132 W. Va. 184, 51 S.E. 2d 105

REASONS FOR GRANTING WRIT

1. The jury found in favor of petitioner, Crookham, that:

(a) Crookham sustained injuries to his body on December 28, 1955, while removing by hand, (without tongs) water-soaked switch ties from the railroad ballast bed.

(b) Employer failed to supply Crookham with safety tie tongs, a foreman to supervise his work, and required him to load, by hand, an old fashioned high-bedded truck the like of which he had never loaded before.

(c) The employer was negligent and the same was the proximate cause of Crookham's injury.

(d) Crookham's injury was traumatic in origin and caused by the negligence of the defendant.

2. The petitioner submits that the record in this case contains ample evidence to support the verdict of the jury on each of the above issues.

3. The jury weighed the evidence and decided for the petitioner and against the railroad company on each of the above issues. The trial judge having heard all the evidence and the defendant's argument on motion for a new trial, was of the opinion that the evidence supported the jury's verdict, as indicated by the trial court's written opinion. (Appendix p. 3a) The trial court entered judgment on the verdict for the petitioner. The jury not only found a general verdict for the petitioner, *but found against the defendant railroad company on the special interrogatory*, thus making a special and a general finding of negligence against the defendant.

4. Due to the nature of the petitioner's injury many questions involved were highly technical. The petitioner presented to the court two medical witnesses, both of whom were surgeons and specialists, skilled in the anatomy of the eye. (R. 95, 236). *It is significant that the defendant introduced no medical witnesses in refutation.* The West Virginia Supreme Court of Appeals in reviewing the verdict of the jury, disregarded the testimony of the highly technical medical witnesses, and based its opinion on general statements of mere medical possibilities, which were not in any way connected or applicable to the petitioner's injury. When asked if he had an opinion as to whether or not the lifting of the cross ties could have been the inciting or producing cause of the detachment of the retina, Dr. Pinschmidt said: "Yes, I do believe the lifting of the cross ties could have been the inciting cause." (R. 103) Dr. Humphries, said about the effect of the lifting of the cross ties: ". . . it is not beyond my belief that this could have been a factor." (R. 243) *The respondent made no effort to dispute this medical testimony and it stands in the record unimpeached.*

5. The Supreme Court of Appeals of West Virginia in the case at Bar was of the opinion that the injury might have occurred at another time. There is ample evidence that injury to the plaintiff occurred while he was engaged in lifting railroad ties. Dr. Pinschmidt, the treating physician, as well as Dr. Humphries, gave testimony that the trauma sustained by Crookham was the competent producing cause of the detached retina. This testimony in all respects is in line with introduction of evidence and was not a mere inference of opinion but left the question to the province of the jury of whether or not the specific

trauma was competent to produce that particular injury. It is to be noted in the testimony of Dr. Pinschmidt (the same can be said of Dr. Humphries' testimony also) that he found the tissues of both eyes normal and of the same nature, degenerated only in consistency with Crookham's age. The first inquiry as to whether the trauma was competent to inflict some harm which would affect the course of the underlying process in the organs involved was most important. Something must be added or taken away from what existed before. Medically, the jury found the lifting of the ties affected the then existing physiological structure involved in the disability, the detachment of the retina then, was not coincidental but was causally connected with the tie lifting. Crookham suffered from nothing but the normal degeneration consistent with his age. All the medical testimony concerning the lifting of the cross ties was that the same was the competent producing cause of the detachment of Crookham's retina. The weight of the evidence was left to the jury. That was the disability before the Court. The jury decided on the medical evidence before it, that lifting of the cross ties was the competent producing cause of the detachment of Crookham's retina. (R. 95-116; 235-253). In effect, Crookham was saying, through his doctor, to the jury, "This is what I was. Look at me as I am now after lifting the ties. Whatever was underlying in me was dormant, the defendant's action caused my injury. It was dormant and you brought it to life. By what right did you destroy the balance of nature and health at my age and plunge me into the misery of my disability." We believe the Court ignored the question of the precipitating factor in its decision and invaded the province of the jury which invasion is contrary to the established rule in West Virginia and this Court.

Bowen v. *Huntington*, 35 W. Va. 682

Barker v. *Ohio River R. R. Co.*, 51 W. Va. 423.

The West Virginia Appellate Court in the case at bar again finds: (Appendix p. 10a)

> "Some of these eyes may have been affected prior to the injury by undiagnosed forms of chorio-retinitis or irido-cyclitis."

In light of the contents of the record in this case this statement is unsupported by any evidence. On the contrary, Dr. Pinschmidt said:

> "—that the condition of the right eye and of the left eye was in normal limits." (R. 101)

Then the Doctor said that had Crookham suffered from any predisposed condition of disease or otherwise of the eye, save those of the normal deterioration from age, "—It would have been unwise to operate—" (R. 106-107. and 115) Thus there is no testimony in this record of previous eye disability, sufficient in nature to have produced the injury here in the absence of trauma.

With all candor, it is believed that the West Virginia Appellate Court stepped out of its roll as a Court of review and made a finding of fact, the same as if it were sitting in lieu of a jury. This is contrary to its own former pronouncements and to the holdings of this court. *Pritt* v. *W. Va. N. R. R. Co.*, 132 W. Va. 184, 51 S. E. (2d) 105. *Rogers* v. *Missouri P. R. Co.*, *Supra*. Thus, the petitioner has been deprived of his right of trial by jury given him under the Federal Employers' Liability Act, and the West Virginia State Appellate Court should be reversed.

6. At the time the petitioner sustained his injury he was not engaged in ordinary routine jobs such as were

ordinarily assigned to a section gang. Rather, it is shown by the evidence that the work which the section gang was instructed to do by their superior was done in an unusual way and in a manner as to place extraordinary burden upon this petitioner. (R. 82)

7. The railroad admits that the safe way of loading ties is by safety tie tongs as indicated by the ownership and presence of tie tongs. This is admitted by the very act of designing and furnishing safety tongs to this and other jobs. (Tongs so constructed as to make it impossible for any number of men less than four to lift a tie R. 227) Here, the petitioner was asked to load ties by hand in a slipshod method without the instruction and supervision of a foreman, (R. 225) which resulted in his lifting over a period of many hours all of the weight of one-half of a large number of heavy water-soaked ties, the like of which he had never done before. The strain required to lift these ties was increased by the vacuum normally found in a wet tie bed. This lifting and strain was, of course, repetitious over a period of time, the sum total of which was disabling. The foreman admits that there were only two pairs of tongs on the job (R. 228) and he and three other men were using one pair of them leaving available only one pair of tongs—four men must have not less than two pairs before they could lift one tie. Crookham was also asked to lift the weight of one-half of many ties (without tongs) one foot higher than he had ordinarily lifted the same, the like of which he was never called upon to do before. (R. 144-145) Had a foreman been sent to this job he could have required each member of the section gang to lift his own part of the load and could have prevented a member of the gang from leaving his crew to assist the truck owner, (to whom the respondent owed no obligation).

Since the digging of post holes and the setting of posts is considered non-hazardous work, the foreman could have left these three men and gone to the place where the four men were doing a new kind of work in a new way. The foreman knew that the four men loading ties had no tie tongs, (R. 225) and also knew there was not a sufficient number of tongs on the job to accomodate two tie crews.

8. The foreman's indifference to the safety of Crookham who was called upon to load a truck the like of which he had never loaded before, and in a new and unusual way, without the use of tie tongs, is excelled only by the indifference of the foreman to Crookham's injury after it had occurred. Crookham, after advising his foreman of his injury, was permitted to remain on the job and work for an additional time of two and one-half days. Then when Crookham discovered the seriousness of the injury, he immediately hospitalized himself and his mobility prevented by constant guard and nurse duty. While in this condition the employer's claim agent appeared at his bedside and there, over the petitioner's protest, propounded questions and took down answers by a court reporter. (R. 170) Promised copies of the inquiry (R. 64, 171-174) were not delivered until the day the case was called in the trial court. (R. 88, 89) This statement, together with the petitioner's personal diary (production demanded by employer—R. 88) was used as a part of its plan of defense.

9. The West Virginia Supreme Court in its decision of March 10, 1959, in the case at Bar reasons: "tie tongs were available (to the petitioner) . . . within a few feet of the place where the crew commenced work . . . and, though the crew knew of the availability of the

tongs, none suggested their use in the loading of the Sayre truck." (Parenthetical language supplied) (Appendix p. 14a)

It is believed, this reasoning is falacious because it, in effect, holds that the petitioner could *assume the risk of his employment*. Such is contrary to the Federal statutes (45 USCA 54) and of the many decided cases of this Court. It is contrary to the holdings of the Supreme Court of Appeals of West Virginia in *Walls* v. *McKinney*, 139 W. Va. 866, 81 S.E. 2d 901, wherein it is said:

> "The master is liable for negligence in failing to use due care to furnish his employee reasonably safe machinery and appliances notwithstanding the employee knew of the danger and with such knowledge used such machinery."

The West Virginia Appellate Court's opinion in the case at Bar quotes with approval the proper rule of law, (Appendix p. 12a) but fails to follow the same.

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. (Italics supplied)

Even though the correct rule was enunciated, yet West Virginia Appellate Court failed to follow the same. In a vein of confession and avoidance it holds that the facts here do not constitute negligence, *even the slightest*. Then, again, the West Virginia Supreme Court of Appeals uses this language in its opinion in the case at bar: (Appendix p. 13a)

> "The fact remains, however, as established by decisions of Federal Courts, indeed by the very wording of the Act, that to create liability thereunder actionable negligence must be established against the employer proceeded against."

Then, in its efforts to apply this rule the West Virginia Court argues that the tongs were not needed because their use would have required a higher lift (this is because the bed of the old fashioned high bedded truck stood too high). This position assumes tie tongs would have been necessary to load an ordinary commercial truck. However, the railroad subjected the petitioner to the task of lifting ties to the higher elevation, with or without tongs—a situation not contributed to or produced by the petitioner. How easily would it have been for the employer to have refused to load the truck or to have requested the truck owner to assume the loading responsibility. On the contrary, the employer undertook to load this truck, (R. 217) and thus adopted this situation as its own. The assumption of responsibility carries with it the hazards of liability.

10. The argument advanced in the West Virginia Appellate Court's opinion to the effect that the retina detachment could have resulted from other causes (naming many) contradicts another part of its own opinion wherein it is stated: (Appendix p. 12a)

> "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the results to other causes. . ."

The holding of the West Virginia Court that the petitioner's injury could have resulted from other causes, is not only in conflict with its own decisions, but is contrary to the consistent holding of this court.

Rogers v. *Missouri P. R. Co.*, 352 U.S. 500, 1 L. Ed. (2d) 493. (using same language as last above quote)

The test of negligence liability is stated in *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358. It says:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53, 61, 93 L. Ed. 497, 504, 69 S. Ct. 413. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of tract. *The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue.* To us it appears to be a debatable issue on which fair minded men would differ." (Italics supplied)

Again, the opinion of the Supreme Court of West Virginia in the case at Bar contains this statement:

> ". . . there is not the slightest proof that injury occurred because of any extra or more strenuous work than that of 'just average labor'. . . ." (Appendix p. 15a)

In arriving at this conclusion the Court completely ignored the testimony in the record, and as well the effect under the law of a jury verdict, as defined by its previous pronouncements. The West Virginia Court has set itself up as a substitute for, and assumed the function of the jury. The Supreme Court of Appeals of West Virginia in *Pritt* v. *W. Va. N.R.R. Co.*, 132 W. Va. 184, 51 S. E. 2d 105 in a *FELA* case, held:

> "It seems unnecessary to restate the position of this Court on the weight that will be given to the finding of a jury on a question of fact. Here the issue involved of whether defendant was negligent by reason of the direction given to the plaintiff by its agent and employee, the conductor, is a question of fact on which different men might reach different conclusions. The jury by its verdict has held that the defendant was guilty of negligence. We would not be justified in disturbing that finding unless we believed such verdict to be plainly wrong. We are therefore of the opinion that the verdict of the jury on the matters submitted to it must be upheld."

The case of *Stewart* v. *Baltimore & Ohio R. Co.*, 137 Fed. 2d 527 holds:

> "There have been many decisions which have held that it is negligent to require a workman to move articles that are too heavy for him to lift without help."

The Supreme Court of the United States in a long and unbroken line of decisions, among which is the leading case of *Rogers* v. *Missouri P. R. R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, lays much stress on a jury verdict, and cautions the lower courts to respect the same. It says:

> "Under this statute (Federal Employers' Liability Act) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought . . ."
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of

his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death, which is the subject of the suit." (Parenthetical language supplied)

"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases."

11. The Supreme Court of Appeals of West Virginia, in the case at Bar, had some conviction that the plaintiff's evidence might have been sufficient to establish negligence, when it said: (Appendix p. 15a) ". . . the only direct evidence which can be pointed to as tending to show that plaintiff's injury occurred because of, or was occasioned by, the loading of the Sayre truck, is his own statement. . . ." Then the court held that despite such "direct evidence" it did not support the jury verdict. The holding in the West Virginia Supreme Court violates the mandate of *Moore* v. *Terminal R. R. Association*, 3 L. Ed. 2d 24, where this language is found: (Headnote)

"In an action under the Federal Employers' Act, the United States Supreme Court will reverse a judgment of a state court revising a judgment entered on a verdict in favor of a railroad employee who was injured when a hand cart he was pulling along a railroad station platform, and which he turned in seeking to pass other carts on the platform, struck a train moving into the station along one side of the platform and caused the employee to be thrown against a railroad car standing along the other side of the platform, where the proofs justify with reason

the jury's conclusion that employer negligence played a part in producing the employee's injury."

Gibson v. *Thompson*, 355 U. S. 18, 2 L. Ed. 2d 1, continues to follow the rule in the *Moore* case. It says:

> "In an action by a railroad engineer seeking recovery, under the Federal Employers' Liability Act, for injuries sustained when the engineer, while walking to his engine, slipped upon loose gravel on the surface of the railroad yard, the District Court, Harris County, Texas, entered judgment on a jury verdict in plaintiff's favor, and the judgment was affirmed by the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas—. . . . The Supreme Court of Texas reversed the judgment below on the ground of the insufficiency of the evidence to show negligence on the part of the railroad—. . . . The engineer sought a writ of certiorari in the United States Supreme Court."
>
> "— the United States Supreme Court granted the petition for certiorari and reversed the judgment of the Supreme Court of Texas, holding that the proofs justified the jury's conclusion that employer negligence played a part in producing the engineer's injury."

Ferguson v. *Ry. Co.*, 356 U. S. 41, 2 L. Ed. 2d 571, holds:

> "A railroad employee who stepped backward when a train approached on tracks near which he was working, and fell into a ditch or water drain and was injured, sought recovery against the railroad in an action under the Federal Employers' Liability Act, instituted in the Circuit Court of Lawrence County, Missouri. At the close of the employee's case, the trial court directed a verdict for the defendant, and the judgment entered thereon was affirmed by the Supreme Court of Missouri. . . . The employee sought a writ of certiorari in the United States Supreme Court."

> ". . . the United States Supreme Court granted certiorari and reversed the judgment below holding that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the employee's injury."

The case of *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511, deals with foreseeability of the injury complained of. The decision of the Supreme Court of West Virginia in the case at Bar, seems to imply that the injury here was not forseeable, and employer asserts this defense in both the trial and State Appellate Courts. The opinion in the *Ferguson* case says:

> "The respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases . . . (Same rule as F.E.L.A. cases)—could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner m i g h t be tempted to use a knife to perform his task with dispatch since no adequate implement was furnished him." (Parenthetical language supplied).

In the *Stewart* case, *supra*, the Court cited numerous cases where negligence in failing to furnish sufficient force to do heavy work resulted in recovery for the injured employee. In one, the employee sustained a wrenched and strained back and dislocated vertebra from carrying a too heavy timber over broken ground; in another, the employee received a double rupture from car-

rying a heavy rail; in another, a broken leg was suffered by an inexperienced workman in attempting to lift a heavy piece of glass; still another, a back injury from lifting a heavy handcar from the ground to a box car; and in one, the employee sustained a hemorrhage from lifting a heavy angle iron to a platform.

If petitioner had, as a result of strain and over-exertion, sustained a strained muscle, wrenched back, hernia, or had suffered a hemorrhage, it appears that the West Virginia Supreme Court of Appeals should have recognized each of these injuries as being one of a class which might reasonably be anticipated to result from strain and over-exertion. The medical witnesses in the case at Bar as previously stated, were highly trained and experienced in their field. They testified that the trauma sustained by Crookham was the competent producing cause of the detached retina; (R. 103) that the strain resulting from the lifting was the only type of trauma that the doctors could associate with the detachment of the retina. (R. 112) The jury by its verdict accepted this theory and confirmed this position. The requirement of the law is that the employer should anticipate the consequence or an injury of the general nature of that which ensued. *Gibson* v. *Thompson*, 355 U. S. 18, 2 L. Ed. 2d 1, 78 S. Ct. 2.

Specially, this Court has held that the likelihood of injury to men pulling or lifting railroad ties beyond their capacity is obvious and that the question of negligence and proximate cause (including therein the element of foreseeability or anticipation) of injury in such a case are questions for the jury. *Stone* v. *N. Y. C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358.

The Court has also held that only the slightest amount of proof is necessary to require submission of the issue of

negligence and proximate cause to the jury, where the absence of foreseeability is raised as a defense. *Ringhiser* v. *Chesapeake & O. Ry. Co.*, 354 U. S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268.

12. Immediately prior to the injury petitioner, Ray Crookham, was only sixty three years of age, in good health, and had never had any organic eye trouble. Only shortly before the injury his eyes were examined and pronounced to be sound (R. 91-92); that Dr. Pinschmidt said that before operating he found that the eye was within normal limits otherwise he would not have operated; (R. 101) that petitioner was in excellent health is supported by the fact that he struggled throughout the day of December 28, 1955, lifting at frequent times all of one half of many heavy water-soaked railroad ties until eighty ties were loaded and the petitioner had ruptured the retina of his eye. (R. 55) Had the petitioner been weak or infirm, this physical ordeal would have broken his endurance. As a result of this continued and sustained strain in obedience to the instructions (and lack of supervision) of his foreman, Crookham is permanently and totally disabled. Despite this total disability, the Supreme Court of Appeals of West Virginia has denied to him the benefit of his jury verdict, thus denying to him the protection afforded him under the Federal statutes and the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the opinion of the Supreme Court of Appeals of West Virginia, in this case, is in conflict with the express provisions of the Federal Employers' Liability Act and the controlling decisions of this Court construing that Act; that a writ of certiorari should be granted in order for this Court to review the record and the opinion of the Supreme Court of Appeals of West Virginia, in accordance with the prayer of this petition.

Respectfully submitted,

J. G. F. JOHNSON,
Point Pleasant, W. Va.

ERNEST FRANKLIN PAULEY,
Peoples Building,
Charleston, W. Va.

Dated January 23, 1959

APPENDIX

STATE COURTS: APPEAL: CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U. S. Code. Sec. 1257.

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U.S. Code, Sec. 51.

IN THE CIRCUIT COURT OF MASON COUNTY,
WEST VIRGINIA

RAY CROOKHAM, *Plaintiff*

v.

NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION,
Defendant.

TRESPASS ON THE CASE—DAMAGES $27,552.00

OPINION OF THE TRIAL COURT IN OVERRULING THE MOTION OF THE DEFENDANT TO SET ASIDE THE JURY VERDICT FOR THE PLAINTIFF AND GRANT THE DEFENDANT A NEW TRIAL.

Plaintiff Ray Crookham instituted his suit in the Circuit Court of Mason County, West Virginia, against the New York Central Railroad Company, a corporation, for damages in the amount of $27,552.00 under the Federal Employers' Liability Act, alleging negligence on the part of the defendant railroad company resulting in injury to the plaintiff's left eye whereby the plaintiff's vision in his left eye was greatly and permanently impaired. A jury trial lasting three days resulted in a verdict for the plaintiff in the amount of $12,500.00, following which defendant's counsel moved the court set aside the verdict and grant the defendant a new trial, later assigning in writing fourteen grounds in support of said motion. However, in the oral argument three points were stressed by defendant's counsel, namely, (1) there is no actual negligence on the part of the defendant resulting in injury to the plaintiff; (2) there is no foreseeable negligence or the injury received could not be foreseeable; and (3) plaintiff's counsel in his closing argument made improper statements to the jury.

Counsel for both sides furnished considerable authority to the court, all of which has been read and carefully studied. The propositions listed above will be dealt with in the order named. Liability of the defendant must, of course, be based upon

negligence. Plaintiff claimed the defendant was negligent in three respects, namely, (1) in not furnishing or supplying a foreman to go with the four men who loaded the ties; (2) in not furnishing tie tongs with which to handle and load the ties; and (3) in furnishing a high truck (four feet) instead of an ordinary truck (three feet) upon which to load the ties. The ordinary defenses to such a suit had been abolished either by statute or judicial decision. The only defense left to the defendant is that of contributory negligence and this does not defeat recovery but can be interposed only for the purpose of mitigating damages. Such a defense, however, presupposes negligence on the part of the defendant.

A special interrogatory was submitted to the jury requesting them to state whether or not the failure to furnish tongs to the four men sent to load the ties onto the truck was negligence on the part of the railroad. The jury answered this interrogatory in the affirmative. Whether this was the only negligence found by the jury on the part of the defendant is not known. It appears to the court that the jury also could have found that it was negligence in not sending the foreman along with the four men engaging in a new and different type of work from which they had presently been engaged in. It would be reasonable to think that the foreman should have left alone the three men who were setting posts preparatory to building a fence and gone with the four men who were starting a new and different type of work and instruct them as to how they should perform this work. Especially so inasmuch as a different type of truck was being used other than that to which the plaintiff was accustomed. It is, therefore, the opinion of the Court that there is sufficient evidence for the jury to find that the defendant was guilty of negligence.

The more troublesome question is whether the injury was foreseeable as a result or proximate cause of the injury. It is not believed that the cases hold to the strict requirement that the particular type of injury must be foreseeable, but merely that injury of some type be foreseeable. It should be noted that the foreman testified that two sets or pairs of tongs were ordinarily used in the lifting of a tie and that as a safety measure he had been instructed to use four men to lift a tie. Such instruction had been given and such practice adopted, no doubt

for the purpose of preventing injury to employees. It would not be necessary for the railroad company to foresee that a strain in lifting a tie might cause the retina to become detached, but merely that such a strain might cause injury to the employee doing the lifting. The Court feels that the injury complained of is loosely connected to the negligence. Dr. Norman Pensmidt, an opthamologist who examined the plaintiff and repaired the detached retina, testified that he came to the conclusion that it was some type of traumatic injury and that the lifting of the cross-ties could have been the exciting cause. From this evidence it is believed that the jury could find that the lifting of the cross-ties was a proximate cause of the injury and that the failure to furnish the tie tongs with which to lift the tie caused the strain resulting in the injury.

The last point to decide is whether there is matter in the closing argument of plaintiff's counsel which would justify setting the verdict aside. The closing argument of plaintiff's counsel was taken down by the court reporter and transcribed, a copy of which has been furnished the court, which copy has been carefully read by the court. In arguing a case before a jury especially counsel in the closing argument should be careful to stay within the confines of the evidence. Yet some latitude as to method or means of argument must be indulged in to accommodate the particular style of argument of counsel, else there would not be much reason to make an argument before a jury. In this case counsel for the defendant interrupted plaintiff's counsel while making his closing argument at different times with objections to the argument following motions to the court to instruct the jury to disregard the argument objected to. In each instance the motion was sustained and the jury so instructed. Counsel for the defendant could have made other objections at the time and motions to instruct the jury to disregard such argument had he thought the same proper at that time. His failure to do so, thereby giving the court a chance to consider such motion, now precludes his making any objection to said argument. The Court might further state that after a careful reading of the closing argument of counsel for the plaintiff, he is of the opinion that counsel in his closing argument stayed well within the required rules.

The Court is, therefore, of the opinion to overrule the motion to set aside the verdict of the jury and an order may be prepared to that effect and rendering judgment upon the verdict of the jury.

/S OLIVER D. KESSELL, *Judge*

OPINION OF SUPREME COURT OF APPEALS OF WEST VIRGINIA

RAY CROOKHAM

v.

NEW YORK CENTRAL RAILROAD COMPANY.

No. 10943

(Reported 107 S. E. 2nd 516)

Supreme Court of Appeals of West Virginia.
Submitted Jan. 27, 1959.
Decided March 10, 1959.
Rehearing Denied April 6, 1959.

Syllabus by the Court

1. In an action prosecuted under the Federal Employers' Liability Act, to be entitled to recover the plaintiff must establish that negligence of the employer contributed proximately to the cause of the injury complained of.

2. In an action prosecuted under the Federal Employers' Liability Act, negligence of the defedant need not have been the sole proximate cause of the injury, but the negligence of the defendant must have contributed to the cause of the injury in some degree.

3. In an action prosecuted under the Federal Employers' Liability Act, negligence of the defendant need not have been justify with reason that the injury complained of resulted, in whole or in part, from negligence of defendant which contributed proximately to the cause of the injury.

Kay, Casto & Chaney, Robert H. C. Kay, John E. Davis, Charleston, for plaintiff in error.

E. Franklin Pauley, Charleston, J. G. F. Johnson, Pt. Pleasant, for defendant in error.

GIVEN, President.

This action was instituted under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., in the Circuit Court of Mason County, by Ray Crookham, against the New York Central Railroad Company, an interstate common carrier, for damages alleged to have resulted from negligence of defendant in failing to furnish plaintiff with a reasonably safe place to work, in failing to furnish proper tools to perform work assigned to him, and in failing to furnish a sufficient number of employees to perform the work assigned. The jury returned a verdict of $12,500 in favor of plaintiff, and the trial court, after overruling the motion of defendant for a new trial, entered judgment for plaintiff in the amount of the verdict.

On December 28, 1955, plaintiff, about sixty two years of age, reported for work assigned to him by defendant, as a section hand. He had worked for defendant, or its predecessor, for about forty two years, performing the usual work of such an employee, except for a short period of time when serving as a foreman of the crew. On the morning of the twenty eighth, the crew to which plaintiff had been assigned was engaged in removing ties from an abandoned track of the railroad system of defendant, and in constructing or repairing a fence along the right of way, using some of the old ties from the abandoned track for fence posts. It was the practice of defendant, when such tracks were abandoned, to clear the right of way of all ties, and often some of the ties were delivered to individuals, without charge therefor. On the morning of the twenty eighth, the crew consisted of eight men, one of whom was foreman. Normally the crew consisted of eight men and a foreman. While engaged in the work indicated, shortly after 9:00 A.M., a Mr. Sayre drove his truck to where the crew was working and requested that he be given ties from the abandoned track. The foreman granted the request and Sayre then drove his truck to the place where the ties were to be loaded, a short distance from where the crew had been working. The foreman directed four of the crew, apparently without designating any particular member thereof, to help Sayre load the ties on the truck. Plaintiff, with three other members of the crew, then proceeded to the place where the truck was to be loaded, and, with the help of Sayre, loaded the ties on the truck. Two loads of ties were placed on the truck, each load consisting of about

forty ties. The foreman gave no instructions as to the manner of loading the ties, or as to the use of any tools in connection with the loading. One of the four employees secured and took along a lining bar for use in loosening the ties from the bed of the abandoned track. The foreman remained with the three members of the crew who continued to build or repair the fence. Tie tongs, tools sometimes used in the lifting or moving of ties, were available at the place of work, but were not used by the employees in loading the Sayre truck. The four employees, including plaintiff, who loaded the Sayre truck were experienced in the manner of handling ties and in loading them on trucks, but apparently had not previously loaded ties on a truck bed of the height of the Sayre truck, four feet from the ground, the usual height of trucks loaded being about three feet. After the four employees lifted several ties onto the bed of the truck, one of the employees assisted Sayre in stacking the ties in proper position on the truck, while the other three employees, including plaintiff, continued to load the truck by lifting the ties with their hands onto the bed. No one suggested the use of tie tongs in connection with the loading, though the employees knew tie tongs were available, and no employee made any objection to the manner or method of such loading. The ties weighed from 141 pounds to 220 pounds each. Plaintiff, testifying as to the supposed injury to his eye, stated: "A. I started to lift a tie. I reached down got it. It was a heavy one, a real heavy tie; I lifted it up. It just felt like salt in my eye. It wasn't a sharp pair—just a kind of burning sensation. When Ed come around, we took some time. I took my gloves off and wiped my glasses.

"Q. Did you ask permission to do this?

A. Mr. Sayre said, 'Ray, your eyes is awful red.' I said I felt pretty good though I wanted to wipe my eyes.

"Q. What, if anything, did you notice with reference to your vision after you felt the burning sensation? A. It was just like it was blurred, like scum on my eye.

"Q. Did that continue from the time you first noticed the misery in the afternoon until you got through loading? A. Yes, sir."

After completing the loading of the Sayre truck, plaintiff returned to the place where other members of the crew were building the fence and assisted in that work the remainder of the day. While helping with the fence work, plaintiff continued to have a burning sensation in his eye, and, as he testified, "went back and sighted posts and when I had sighted something like to three or four, Mr. Hayes said the posts were leaning away over. Mr. Whittington, the boss, was standing over there and I said, 'Pete, come over and sight these posts.' He came.

"Q. Mr. Whittington, your foreman, was standing there and you asked him to sight them? A. Yes, sir.

"Q. Did you tell him that you couldn't see? A. Yes, sir. That is right." On reaching home in the evening, he was unable to read the paper, unable to "even line up the headlines of it". On the morning of the twenty ninth, he returned to work, but told his foreman that he "couldn't see" and that his "eye was blacked out". He continued to work on the twenty ninth, "worked on the fence, stretched wire and stapled the posts", but his eye was "still blurred". He also worked through the thirtieth, but was told "to patrol the track", was "looking for any defects in the railroad track".

On Saturday, December 31, plaintiff consulted an optician, who advised him to see an eye specialist. On complete examination by the eye specialist it was found that plaintiff had suffered "a large detachment of the retina extending over the infero--temporal half of the retina" of the left eye. The vision of the right eye "was 20-20 with glasses". After an operation to correct the condition of the left eye, and after plaintiff had reached maximum recovery, the objective findings were: "The right eye remains perfectly normal, except for some minimum changes associated with aging. The left eye shows a complete re-attachment of the retina. It is back, I don't know the wall around it. There is some pigmentation, which is always a result of the electric needle. The center portion of the retina is healthy except for some fine scar in this vital point known as the macula. The vision is 20/200 minus."

It is the contention of plaintiff that the detachment of the retina of the left eye was of traumatic origin, occasioned by the lifting of the ties loaded onto the Sayre truck. The medical

evidence conclusively shows that such a detachment may be occasioned by trauma but that "The force of the traumatism is not necessarily one of a great degree, in fact injuries from such objects as soft balls, a bump to the back of the head, a sudden jar in missin a step, are as frequent an etiological factor as are the injuries from a fist, sticks, and elbows, from stones, a sharp edge of a floor or the back of a chair * * * the separations may occur immediately, several days or weeks later, or even with a delay of several months. Further, in all traumatic separations one must not forget that while the trauma may be the real cause of the separation, (some of these eyes may have been affected prior to the injury by undiagnosed forms of chorio-retinitis or iridocyclitis.") There appears to be no doubt that such a detachment may occur from "just average labor", or from "stepping from one step down to another". The physician who discovered the detachment, and operated on the eye of plaintiff, testifying in behalf of plaintiff, was asked and answered the following questions:

"Q. You also know, do you not, doctor, that a person who is nearsighted and who has had a certain amount of deterioration due to age, could have a detached retina with a very slight amount of physical energy? A. I think that is true.

"Q. It wouldn't be necessary for him to be lifting any object, just average labor, that could do it? A. It could." He was also asked to give an opinion as to whether the lifting of the ties "could have been the inciting or producing cause of the detachment of the retina", and in answer stated: "Yes, I do believe the lifting of the cross-ties could have been the inciting cause." In answer to another question, the physician stated: "* * * I was left with the impression that this was some type of traumatic injury."

The other physician, an eye specialist, who testified on behalf of plaintiff, concluded: "And it is not beyond my belief that this could have been a factor. Not the main factor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors."

The plaintiff, prior to the injury, wore eye glasses, "had a minor degree of nearsightedness", and was affected by arteriosclerosis in "a normal amount for a man of his age", and "had noticed floaters before his left eye" three or four months before the injury.

The jury answered in the affirmative the following special interrogatory: "Should the section crew have used the tie tongs to load the ties on the Sayre truck?"

[1] Pertinent provisions of the Federal Employers' Liability Act are: "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. Section 51, 45 U.S.C.A. § 51.

"In all actions * * * to recover damages for personal injuries * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *". 45 U.S.C., Section 53, 45 U.S.C.A. § 53.

"In any action brought against any common carrier * * * such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *." 45 U.S.C., Section 54, 45 U.S.C.A. § 54.

In Moore, Adm'x. v. Chesapeake & Ohio Railway Co., 340 U.S. 573, 71 S.Ct. 428, 430, 95 L.Ed. 547, the plaintiff sought recovery of damages on the theory that the engineer of defendant was negligent in making a sudden unexpected stop without warning, causing decedent-brakeman to be thrown from a place of safety to his death. In affirming the action of the trial court and entering judgment for defendant notwithstanding the verdict for plaintiff, the Supreme Court said: "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the engineer's testimony that he

stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof.

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 1089, 87 L.Ed. 1458." See Tennant, Admr'x v. Peoria & Pekin Union Railway Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Herdman v. Pennsylvania Railroad Co., 352 U.S. 518, 77 S.Ct. 455 1 L.Ed.2d 508. In Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, the Court said: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis added.)" The language quoted leaves no doubt, in the usual case at least, as to when the question of negligence of an employer-defendant under the Act becomes a question for jury determination. Though negligence of an employer constitutes only the "slightest" part of producing the injury, and though the proof establish that the injury may probably have resulted from causes other than negligence of the employer, the question remains one for jury determination if the "proofs justify with reason the conclusion

that employer negligence played any part, even the slightest, in producing the injury." The common law theory of proximate cause, like contributory negligence, and like the assumption of risk doctrine, is not to be applied in cases prosecuted under the Act in the manner of its application under the common law. The fact remains, however, as established by decisions of Federal Courts, indeed by the very wording of the Act, that to create liability thereunder actionable negligence must be established against the employer proceeded against. See Pritt v. West Virginia Northern Railroad Co., 132 W.Va. 184, 51 S.E.2d 105, 6 A.L.R. 2d 562, certiorari denied 336 U.S. 961, 69 S.Ct. 891, 93 L.Ed. 1113; Riley, Adm'x v. West Virginia Northern Railroad Co., 132 W.Va. 208, 51 S.E.2d 119, certiorari denied 336 U.S. 961, 69 S.Ct. 891, 93 L.Ed. 1113.

In Tiller, Executor v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 63 S.Ct. 444, 451, 87 L.Ed. 610, after stating the history and purpose of the Congress in enacting the Federal Employers' Liability Act, the Court said: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. A fair generalization of the rule is given in the Senate Committee report on the 1939 ...endment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' Of course in any case the standard of care must be commensurate to the dangers of the business. Hough v. Railway Co., 100 U.S. 213, 218, 25 L.Ed. 612; cf. Northern Pacific R. Co. v. Herbert, 116 U.S. 642, 652, 6 S.Ct. 590, 595, 29 L.Ed. 755."

2. Plaintiff rests his case on allegations that defendant failed to furnish a safe place to work, that proper tools were not furnished, that a sufficient number of employees to safely perform the work were not assigned to the work, and that the employees assigned to the work were not properly supervised in the performance thereof.

3. The only contention of plaintiff as to the failure of defendant to furnish proper tools for the performance of the work

relates to tie tongs. The proof is conclusive that tie tongs were available, within a few feet of the place where the crew commenced work on the morning of the twenty eighth and, though the crew knew of the availability of the tongs, none suggested their use in the loading of the Sayre truck. It appears to be definitely established that the use of the tongs would have necessitated more strenuous lifting, in the loading of the ties, for the reason that their use would have required the employees to raise the weight of the ties being loaded onto the truck much higher, perhaps as high as their heads, since the handles of the tongs were always considerably above the weight being lifted. The foreman testified to the effect that he did not direct the employees to use the tongs for the reason that the truck could be more safely and easily loaded by lifting the ties by hand. In that judgment all of the crew, all experienced in handling ties, appear to have concurred at the time, since no suggestion of a need for the use of the tongs was made. In such circumstances, the foreman can not be said to be negligent in having decided the best procedure to load the truck, simply because an injury occurred. We have not overlooked the answer of the jury given to the special interrogatory. At most, the interrogatory, as worded and answered, is inconclusive as to any negligence of defendant. It could as well mean that the plaintiff was negligent in not using the available tongs as to imply negligence on the part of defendant in not compelling the use thereof. Moreover, the finding or answer to such a special interrogatory can not be allowed to control where it is not supported by proof. See 19 M.J., Verdict, Sections 23, 24.

As to the contention of plaintiff that a sufficient number of employees was not assigned to the work of loading the Sayre truck, no witness even suggests that more than four employees should have been assigned to the work, and the evidence is conclusive that four employees were assigned and assisted at every stage of the work. The real complaint appears to arise from the fact that one of the four employees, with the assent of the others, assisted Sayre in stacking the ties on the bed of the truck instead of assisting the other three employees in lifting the ties to the bed of the truck. That question, however, directs itself to the last contention of plaintiff, whether defendant should have directly supervised and controlled the four em-

ployees in the precise manner of loading the Sayre truck. We have concluded that defendant was not negligent in that respect.

Of a certainty, the four employees directed to assist Sayre in loading the truck were experienced in handling and loading ties. Two of them had previously served as foremen of the section hand crew. Plaintiff had performed the same type of work for about forty two years. The work regularly assigned to the crew, the fence work, was to continue and it was necessarily a matter for the judgment of the foreman as to whether he should remain with that part of the crew, or leave that work and direct the loading of the truck. We think there is nothing in the record to even indicate the slightest negligence in the decision made or the action taken by him.

Assuming, however, that negligence of defendant was prima facie established by plaintiff as to one or more of the matters complained of, we are still faced with the contention that no proof exists tending to establish that the injury complained of resulted from such negligence. There is no conflict in the medical evidence as to the fact that a detachment of the retina, such as that suffered by plaintiff, may result from "just average labor", or by "persons stepping from one step down to the other"; and that the "separations may occur immediately, several days or weeks later, or even with a delay of several months." The only direct evidence which can be pointed to as tending to show that plaintiff's injury occurred because of, or was occasioned by, the loading of the Sayre truck, is his own statement that "It just felt like salt in my eye. It wasn't a sharp pain—just a kind of burning sensation." This, however, can hardly be evidence tending to show that the detachment occurred or was occurring at the precise time he was loading the truck, in view of the following undisputed medical evidence: "Q. On detachment of the retina there is no pain? A. No. It can't happen. Pain-wise you just don't know you got it."

As we view the entire evidence, there is not the slightest proof that the injury occurred because of any extra or more strenuous work than that of "just average labor", or, in fact, from any work done by plaintiff in the loading of the Sayre truck. The cause of the detachment, if actually the result of

trauma, may have occurred from work performed by plaintiff before the commencement of the loading of the Sayre truck, indeed, "several days or weeks" before that time, or while performing work subsequent to such loading, before the discovery of the detachment three or four days later. To permit jury to say which is to permit it to "speculate". See Herdman v. Pennsylvania Railroad Co., supra; Jenkins v. Kurn, Trustees, 313 U.S. 256, 61 S.Ct. 934, 85 L.Ed. 1316; Wilkerson v. McCarthy, Trustees, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497.

[4] Numerous objections to the action of the trial court in giving or refusing instructions are made points of error by defendant. Though the view the Court takes as to the nonexistence of any proof of negligence on the part of defendant renders unnecessary a full discussion of such objections, it may be helpful, in the event of a new trial, to indicate the view of the Court as to the principal objections. Plaintiff's Instruction No. 2 reads: "The Court instructs the jury that if you shall believe from a preponderance of the evidence in this case that the plaintiff was injured in performing the duties of the job for which he was employed by the New York Central Railroad Company, and that such injury was proximately caused by the defendant in failing to exercise ordinary care to furnish the plaintiff a reasonably safe place to work, and that said injury sustained by the plaintiff was proximately caused, in whole or in part, by the negligence of the defendant, then your verdict should be for the plaintiff, in such an amount as you think proper from the evidence, but not to exceed the amount of $27,552, the amount sued for."

Defendant contends that the instruction is binding and ignores any element of contributory negligence. The Court is of the view, however, that the instruction is not a binding one, and that it is in sufficient form; and that, assuming the existence of proof of primary negligence, the giving of the instruction would not constitute prejudicial error, since the jury was told in another instruction that "if you find that the plaintiff was guilty of negligence which contributed proximately to cause his injury and that the defendant was also guilty of negligence which contributed proximately with the negligence of the plaintiff to cause injury to the plaintiff, that it is your duty to diminish the amount which, in your opinion, under the

evidence, you believe that the plaintiff herein will be entitled to recover by reason of the negligence of the defendant, by an amount in proportion to the amount of negligence attributed to the plaintiff." (The writer of this opinion is of the view, however, that the giving of such an instruction would constitute prejudicial error for the reason that it tells the jury that they may assess damages in the full amount of plaintiff's injury, notwithstanding there is in the case proof of contributory negligence of plaintiff, and notwithstanding the Federal Employers' Liability Act specifically requires that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee".)

Other instructions complained of told the jury in effect that under the proof they could find defendant guilty of negligence in not furnishing "sufficient help", or if it failed to "furnish a sufficient number of competent" employees to perform the work to be done, or failed to "furnish adequate and sufficient tools" to perform such work. The Court finds no substantial objection to the form or substance of such instructions, but, as pointed out, is of the view that no proof was offered justifying the reading of them to the jury.

The judgment of the Circuit Court of Mason County is reversed, the verdict of the jury is set aside, the defendant is granted a new trial, and the case is remanded to that court.

Reversed; verdict set aside; new trial awarded; remanded.

ORDER DENYING PETITION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of April, 1959, the following order was made and entered, to-wit:

RAY CROOKHAM, *Plaintiff Below, Defendant in Error*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, *a Corporation, Defendant Below, Plaintiff in Error*

NO. 10943

The Court, having maturely considered the petition for rehearing and reargument filed in this case, is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest:

KENNETH E. HINES,
Clerk Supreme Court of Appeals

ORDER STAYING MANDATE OF SUPREME COURT OF WEST VIRGINIA

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th day of April, 1959, the following order was made and entered, to-wit:

RAY CROOKHAM, *Plaintiff Below, Defendant in Error*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, *a corporation, Defendant Below, Plaintiff in Error*

NO. 10943

Upon a writ of error and supersedeas to a judgment of the Circuit Court of Mason County, rendered on the 15th day of July, 1957.

On this day came the defendant in error, Ray Crookham, by E. Franklin Pauley, his attorney, and presented to the Court his motion in writing to stay the mandate of this Court pending an application to the Supreme Court of the United States for an appeal in this case pursuant to the provisions of the Code, Chapter 58, Article 5, Section 31. Upon consideration whereof, the Court is of opinion to grant the motion. It is therefore considered and ordered that the mandate of this Court be stayed for a period of ninety days after the end of the present term, in order to permit the aforesaid defendant in error to apply to the Supreme Court of the United States for an appeal or certiorari herein, but this order is not to take effect until the said defendant in error, or some person for him, shall have given before the Clerk of the Circuit Court of Mason County bond with good personal security in the penalty of Two Hundred Dollars; conditioned according to law: all of which is ordered to be certified to the Circuit Court of Mason County.

A true copy.

Attest:

KENNETH E. HINES,
Clerk Supreme Court of Appeals

BOND POSTED IN COMPLIANCE WITH COURTS ORDER

RAY CROOKHAM

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, *a corporation*

STATE OF WEST VIRGINIA

COUNTY OF MASON, To-wit:

I, Dan Hope, clerk of the Circuit Court of Mason County, state aforesaid, do hereby certify that Ray Crookham has executed and lodged with this court a bond in the amount of Two Hundred Dollars ($200.00)., with Margaret S. Johnson, surety thereon; preliminary to the filing of a petition for writ of certiorari to the Supreme Court of the United States in the case as above styled, which said bond is conditioned upon the payment of all damages that is incurred by anyone incident to the suspension of the opinion and order of the Supreme Court of Appeals of West Virginia in which the latter court reversed the circuit court of Mason County and set aside a jury verdict therein, in the event that the said petition is refused.

Dated this the 7th day of April, 1959.

DAN M. HOPE
Clerk of the Circuit Court
of Mason County, W. Va.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

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STATUTE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

STATEMENT OF FACTS

We regret that the many erroneous statements of fact in the petitioner's brief necessitate that this brief be longer than it ordinarily would have been had such misstatments of fact not occurred and also had the petitioner presented a statement of essential facts sufficient to afford a clear understanding of the legal principles invoked and involved in this case.

The petitioner states at page 4, and throughout his petition, that the truck Crookham was loading was "an old-fashioned high bedded, non-dump truck"; that its bed was one foot higher than an "ordinary bed". The truck the men were loading was a 1951 flat bottom Dodge truck which stood four feet above the ground (R. 144). The

alleged accident occurred December 28, 1955, so the truck was only four years old. This is the only evidence as to the type of truck being loaded that day. There is no evidence that this was an old-fashioned high bedded truck nor is there any evidence that the bed of an ordinary truck as usually used by the respondent stood three feet above the ground; although it is true that there is evidence that the back end of a dump truck, with the front end elevated, will be about three feet from the ground. (R. 49). Likewise the ties were not water soaked in the sense that term is ordinarily used. The ties were in the ballast bed of the passing track, but they had not been lying in water as the term "water soaked" would indicate.

On pages 4 and 5, it is stated that the foreman, Whittington, admitted that the customary and accepted method of loading ties was by the use of tie-tongs; that had he been present he would not likely have permitted the men to load the ties in such a manner, or with such a number of men. This is not accurate. Whittington testified:

> "Q. Now what is the safest and easiest way to load ties on the truck which Mr. Sayre had?
> A. By hand.
> Q. In what way? How by hand?
> A. By just taking a bar, loosening the tie, picking it up, tossing it on the truck. If you take tongs, you have to lift above your head to stack them on the truck." (R. 216),
>
> * * *
>
> "Q. Then you use tongs to load the big ones?
> A. If they go in end-wise. Sidewise you wouldn't." (R. 227).
> "Q. Have you ever loaded a main line tie (a big one) a distance of four feet. Just using two men?
> A. No but I have loaded them with three men." (R. 227).

The statement on page 5 of petitioner's brief alleges that the loading of the ties was "* * * with, in the main, a three man crew." The facts are that at least two thirds of the time the ties were lifted on the truck with a four man crew. (R. 59).

It is also there stated that when one of the four men left, Crookham's lifting burden and strain were "many times doubled". This, of course, is patently absurd.

It is not true, nor can it be concluded as stated on page 6 of petitioner's brief, that tie-tongs were not furnished and available to the petitioner. Whittington testified (R. 228-229):

> "Q. Now, did you not testify here yesterday that you have only two pair of tongs in the truck on that job?
> A. Yes.
> Q. So you were using the tie-tongs to drag the fence post with?
> A. No.
> Q. I thought you said a moment ago you were?
> A. We was cleaning right of way, getting brush out."

It is true that there were only two sets of tie-tongs on the job, but it is not true that the ties were always taken to the post holes by a pair of tongs, as stated in petitioner's brief. The men carried the crossties, which were to be used for fence posts, by hand and sometimes by use of tie-tongs from the side-track to the right of way fence. Crookham testified, on direct examination:

> "Q. On this morning of the 28th of December, '55, you said you were building fence for about two hours. What kind of posts were you using?
> A. Ties.
> Q. Second hand ties out of the passing tracks?
> A. Yes, sir.

Q. How were you lifting those ties on this morning from the road bed to the right of way of the fence, by hand or by tongs?

A. Sometimes by hand and sometimes by tongs." (R. 52).

ERRORS AND MISSTATEMENTS OF FACT IN PETITIONER'S BRIEF UNDER THE HEADING "REASONS FOR GRANTING WRIT"

Under "1 (a)" petitioner states that these ties were "switch ties". This is just a plain misstatement of fact. Switch ties are longer and heavier than cross-ties. All the witnesses, including Crookham, testified that the ties being loaded were cross-ties, which are eight and a half feet long. Crookham said (R. 82) when asked how long the cross-ties were, "eight and a half feet".

The statement under "1(b)" that the employer failed to supply Crookham with safety tie-tongs and required him to load, by hand, an old-fashioned high bedded truck, the like of which he had never loaded before, is not true. Regarding the tie-tongs, as pointed out in the statement of facts, the employer did supply them. They were available and on hand where the men, including Crookham, were working; but none of the men, including Crookham, evidently thought tie-tongs were either necessary or useful. After his experience in loading the Sayre truck in the morning, without tie-tongs, Crookham went back, in the afternoon to load the truck again without tongs. There is no evidence that the employer required Crookham to load the truck by hand. They could have loaded the truck any way they wished. All were experienced section men, with many years of service, and two of them, including Crookham, had been section foremen. The work was not of an unusual type but only required that three or four men lift ties varying in weight from 125 to 220 pounds, or at the most 73.3 pounds weight for each man

if three were lifting. As pointed out previously, the Sayre truck was not an old-fashioned, high-bedded truck, nor was it one the like of which Crookham had never loaded before.

On page 10, paragraph 4, the petitioner places significance upon the fact that the railroad did not produce medical witnesses of its own. The respondent relies on the testimony of the petitioner's medical witnesses. Dr. Pensmidt said that he believed that lifting cross-ties *could* have been an inciting cause, and Dr. Humphries stated, "It is not beyond my belief that this (lifting ties) could have been a factor." However, Dr. Pensmidt also testified:

> "Q. I believe you stated that he (the patient) had arteriosclerosis in keeping with his age, which at the time was 62?
>
> A. Yes, sir.
>
> * * *
>
> Q. And nearsighted persons are more prone to have detached retina than farsighted persons. That is your observations and according to reports made by persons who have made a study in this particular field?
>
> A. Yes, sir.
>
> Q. Now, a person can have a detached retina from a very minor lift, can they not?
>
> A. Yes, sir. (R. 104).
>
> Q. You also know, do you not, doctor, that a person who is nearsighted and who has had a certain amount of deterioration due to age, could have a detached retina with a very slight amount of physical energy?
>
> A. I think that is true.
>
> Q. It would not be necessary for him to be lifting any object, just average labor, that could do it?
>
> A. It could.
>
> Q. Of course, you don't know what caused this one?
>
> A. No, sir. (R. 105-106).

On direct examination, Dr. Pensmidt testified:

> "A. * * * He (Crookham) further stated that on the previous night he had noticed a brilliant flash of light like *lightening* on going to bed. On the previous day, that is the day before, he said that he had been doing heavy lifting of railroad ties; that he had never done any other type of work. (R. 97).

Dr. Humphries testified:

> "Q. * * * And is it not also true that a person can have a detached retina, especially those after they get fifty, when they don't have any extra exertion, but it may come with a normal amount of exertion?
> A. That's true." (R. 246).

Dr. Humphries further testified that a detached retina may occur from coughing, lifting sacks of wheat, etc. (R. 243).

Neither Dr. Pensmidt nor Dr. Humphries attempted to say what caused the detached retina in the left eye of Crookham. They only state that a man of his age, who is nearsighted, *could* have a detached retina from normal work, from a slight jar, from moving a table, or just average labor. Dr. Pensmidt stated he did not know what caused the detachment in Crookham's eye. He merely says any number of things could have produced it.

On page 10, paragraph 5, of petitioner's brief, it is stated that "The trauma sustained by Crookham *was the competent producing cause of the detached retina*". (Emphasis supplied). To begin with, this statement makes the quite unwarranted assumption that "trauma" was involved in this case. Furthermore, as shown previously and in the Appendix, pages 35-40, neither doctor would state what actually caused the detachment.

Dr. Pensmidt testified, in response to a question of plaintiff's counsel, as to the inciting or producing cause of the detached retina, that:

> "A. Yes, I do believe the lifting of the cross tie *could* have been the inciting cause." (R. 103). (Emphasis supplied).

We respectfully submit that there is a vast difference between the use by the doctors of "*could* have been the inciting cause" and the use by counsel for petitioner of the phrase, "*was* the competent producing cause."

Dr. Humphries, testifying regarding the work involved in lifting ties, stated as follows:

> "And it is not beyond my belief that this could have been a factor. Not the main factor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 243).

The emphasis placed on the height of the truck (four feet) is, we believe, without any merit whatsoever. The tie would weigh the same whether it was lifted one foot, two feet, three feet or four feet. Crookham stated that there was nothing unusual for a section man to lift 100 pounds, as he had done many times. In the few instances in which the men were lifting ties of the maximum weight of 220 pounds, the most that any employee would be lifting when three men were loading would be only 73.3 pounds and when four men were loading 55 pounds. On 125 pound ties the weight for each man would be 42 pounds on a three man crew and 31 pounds on a four man crew. Most of the ties, being from a passing track, were of the lesser and not the greater weight.

There is no statement in the record, and a careful reading of the record cited by the petitioner, pages 144-145, will not sustain the assertion that Crookham was lifting ties at a height he had never been called upon before to lift. The assertion, page 14 of petitioner's brief, that "The foreman knew that the four men loading ties had no tie-tongs (R. 225), and also knew that there was not a sufficient number of tongs on the job to accommodate two crews," is a plain distortion of the facts. The truth is that there were two sets of tongs on the job, but that the crew loading the truck was not using them nor were the foreman and the other three men who were cleaning the fence row using them. They were not being used by anybody. They were available and near at hand to Crookham and the crew, if they had wished to use them. No employee suggested their use in loading the truck, or objected to the manner or method of loading the truck.

An attempt was made, page 14, paragraph 8, to infer that the foreman was indifferent to Crookham's injury. This distortion is limited only by the ingenuity of plaintiff's counsel. Crookham testified:

> "Q. Now, Ray the first time you told foreman Whittington about any eye trouble was the next morning after the 28th, up at Arbuckle, when you reported to work?
>
> A. Yes.
>
> Q. And at that time he asked you how your eye was, didn't he?
>
> A. I reported my eye blacked out. He said, 'You want to go to a doctor'. I said I didn't know what happened, it might get all right.
>
> Q. In other words, foreman Whittington asked you if you wanted to go to a doctor and you told him you thought it would be all right?
>
> A. Yes.
>
> Q. You worked the next day?
>
> A. Yes.

Q. And the next day he made inquiry about how your eye was?

A. Yes.

Q. And you said, about the same?

A. Yes. (R. 87).

Again in paragraph 10 on page 15 of the petitioner's brief, it is assumed that the doctors testified that the detached retina of Crookham's eye *was* caused by the lifting of the ties when as a matter of fact no doctor so testified. As Dr. Humphries stated the lifting of the ties would not be a primary cause but only a secondary contributing cause. He testified that "And it is not beyond my belief that this could have been a factor. Not the main factor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 243). Again on page 22, petitioner's counsel make the statement in reference to the doctors: "They testified that the trauma sustained by Crookham *was* the competent producing cause of the detached retina." (Emphasis supplied). No doctor stated that lifting ties "was" the competent producing cause of the detached retina. Dr. Pensmidt testified that he did not know what caused the detachment in Crookham's eye. (R. 106, page 5 this brief). They only stated it "could" be such cause, and Dr. Pensmidt explained that it was more likely to occur in lifting railroad ties than with balloons, "but that wouldn't mean that healthy, normal people couldn't lift railroad ties". (R. 112).

The quotation from the opinion of the Supreme Court of Appeals of West Virginia, page 19, being incomplete, is misleading. The full statement is:

> "The only direct evidence which can be hinted to as tending to show that plaintiff's injury occurred because of, or was occasioned by, the load-

> ing of the Sayre truck, is his own statement that 'it just felt like salt in my eye.'
>
> "This, however, can hardly be evidence tending to show that the detachment occurred or was occurring at the precise time he was loading the truck in view of the following undisputed evidence: 'Q. On detachment of the retina there is no pain? A. No. It can't happen. Pain-wise you just don't know you got it.'"

That the petitioner doggedly deduces from this that the Supreme Court of Appeals of West Virginia had negligence in mind is representative of his ragged ratiocination throughout his petition and to condone and approve such misty conclusions would be to permit "speculation run riot" which this court condemned in *Moore* v. *C. & O. Ry.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547, and *Herdman* v. *Pennsylvania Ry.*, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508.

REASONS ASSIGNED FOR DENYING WRIT OF CERTIORARI

The pertinent part of Section 51, Title 45 of the United States Code, Annotated, provides:

> "Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person *suffering injury* while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (Emphasis supplied).

The modern rule in F. E. L. A. cases was announced by this Court on February 25, 1957, in *Rogers* v. *Missouri*

Pacific Railway Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, reh den 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764; *Webb* v. *Illinois Central Railway Company*, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451, reh den 353 U. S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 809; *Herdman* v. *Pennsylvania Railway Company, supra*, and *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 1 L. Ed. 2d 511, 77 S. Ct. 457. Syllabus 7 in the *Rogers* case lays down the rule for the test of a jury case. It declares that:

> "The test of a jury case in an action to recover for personal injuries under the Federal Employers' Liability Act is whether the proofs justify with reason the conclusion that the employer's negligence played even the slightest part in producing the injury or death for which damages are sought; when this test is met the judge must find that a jury case exists notwithstanding that, from the evidence, the jury may also, on grounds of probability, reasonably attribute the result to other causes, including the employee's contributory negligence."

The Supreme Court of Appeals of West Virginia, in deciding the Crookham case, followed this rule and quoted extensively from the *Rogers* case. (See page 12a of petitioner's brief) The issue now before this Court on the application for this writ is whether the facts in the Crookham case fit this rule and the language of the act itself that there must be some *negligence*, however slight, and that there must be an *injury*. In *Dessi* v. *Pennsylvania Railroad*, 152 F. 2d 149 (decided January 1958), certiorari denied, May 26, 1958, 350 U. S. 936, 3 L. Ed. 2d 1073, 78 S. Ct. 1006, the United States Court of Appeals, Third Circuit, held in syllabus 3:

> "In action by mechanic against railroad under Federal Employers' Liability Act for injuries sustained when handle of jack, with which he had jacked up corner of railroad car, allegedly struck

him on the back of the head, mechanic was not entitled to have jury pass on issue whether failure of railroad to adopt safer method of work caused accident in part *merely by proving that there was a safer method of doing the job*, that mechanic was knocked unconscious, and that jack handle was found on the ground. Federal Employers' Liability Act as amended 45 U. S. C. A. § 51 et seq." (Emphasis supplied).

In the *Dessi* case the court held that the employee was not entitled to have a jury pass on the issue of whether or not the failure of the railroad to adopt a safer method of work constituted negligence when the plaintiff merely proved that there was a safer method of doing the job. In the Crookham case it is argued that it would have been safer for Crookham and the others to use tie-tongs to load the truck, even though the foreman and all of the section crew who were doing the work testified that it was much safer to do the work without tie-tongs. However, by the rule laid down in the *Dessi* case (in which certiorari was denied by this Court), the inference advanced in petitioner's brief, i.e., that a safer method to load the truck would have been by the use of tie tongs, does not make out a case for a jury determination.

The four acts of alleged negligence as set out on page 6 of petitioner's brief and the answers thereto are as follows:

(1) The Charge:

"In not furnishing and supplying a foreman to go with and supervise the 4-man crew in loading the ties."

The Answer:

(a) It was not necessary for a foreman to be present on this kind of a job when all the men are workmen of many years' experience and two of the four, including Crookham, had been section foreman. Crookham was the

oldest employee in point of service, including the foreman. The work of lifting cross-ties, which weighed from 125 to 220 pounds apiece, from the ground and loading them onto the back end of a truck four feet above the ground was not hazardous work. All of the men were familiar with the kind of work to be done, the tools necessary to do it with, and they, themselves, selected a lining bar rather than tie-tongs as the only tool necessary, convenient or useful in loading the truck. The lining bar was used only for the purpose of prying loose any tie that might be stuck in the ballast so that it could be picked up by hand. The heaviest tie, if four men were lifting it, would place a weight of 55 pounds on each man and if three men were lifting it, it would place a weight of 73.3 pounds on each man. All the section crew, including the plaintiff, testified that they had sufficient men to load the ties. (R. 81) The plaintiff himself stated that a section man should be able to lift 100 pounds without any difficulty. (R. 81). The foreman testified that if he had accompanied the men he would not have permitted them to load the ties with tongs but would have directed that they load the ties by hand, for that was the safest way to load them. It is not necessary to have a foreman present for the performance of a simple task, with which a crew is familiar and has performed many times.

In *Pruitt* v. *N. & W. Railway*, 188 Ky. 204, 221 S. W. 552, a F. E. L. A. case, the court held that a foreman of a section crew need not personally supervise a single operation which can be performed by any workman of ordinary intelligence. (See Appendix, pages 46-47, for a fuller discussion of this case.)

The crew that loaded the ties in the Crookham case were all workmen with many years of experience. One of the employees, Plants, had been a foreman before the accident and was acting as a foreman at the time of the trial. Crookham had, for a while, worked as a foreman.

Here were experienced laborers who were charged with the simple operation of loading a truck with ties, and we respectfully submit that no foreman was necessary to tell each individual laborer every single move he was to make. Certainly American labor has not reached the point where they are to be treated as mere automatons and a foreman or supervisor is required to stand over them and instruct them in every particular as to what they must or must not do.

(b) There is no evidence that Crookham would not have had a detached retina if the foreman had been present or if four or five or six men had been used in loading the ties or if tie-tongs had been used.

(c) Crookham had loaded ties on a push car before. (R. 82) He had loaded ties on company trucks that were not dump-trucks. (R. 48) He had loaded ties on individual's trucks before with only three men and with no tongs. (R. 86)

(2) The Charge:

"In not furnishing petitioner with sufficient number of safety tie tongs (designed so that no number of men less than four could use the same) customarily used in handling and loading ties. (A fact found by the jury)."

The Answer:

In the first place, the assertion that the tie-tongs were designed so that not "less than four could use them" is inaccurate and misleading. Tie-tongs require only two men—no more, no less. Furthermore, the jury did not find that Crookham was not furnished a sufficient number of tie-tongs. The special interrogatory was: "Should the section crew have used the tie-tongs to load the ties on the Sayre Truck?", not "that the tongs were not available." (R. 15). Two sets of tongs were furnished and available if the men, including Crookham, had wanted to

use them. Crookham testified that the company had furnished the tongs and that they were available but that the men did not use them either in the morning or in the afternoon loading. (R. 75) The foreman testified that the remainder of the crew who were cutting brush were not using the tie-tongs at the time of the alleged "injury". Both sets of tongs were available and close at hand if Crookham and his crew wanted to use them.

In *Ferguson v. Moore-McCormack Lines, supra*, decided the same day as the *Rogers* case, a ship's baker was using a sharp butcher knife to remove hardened ice cream from a container in order to fill orders placed with him by the ship's waiter. He struck a hard spot in the ice cream causing his hand to slip down on the blade of the knife. The question arose whether the baker's employer was negligent in failing to furnish him with an adequate tool with which to perform his task. The employee testified that, although hard ice cream could have been loosened safely with an ice chipper, the employer, Moore-McCormack Lines, had not furnished him with such an instrument. The Court held that, "the jury may conclude that the employer furnished the baker no safe tool to perform his task and should have foreseen that the baker might have been tempted to use a knife to do the work with dispatch." (Part of Syllabus 1). In the body of the opinion, it is stated: "There was no showing that any device was close at hand which would have safely performed the task."

In the *Crookham* case, the evidence is abundant, clear, and undisputed, by the testimony of Crookham and others, that the tie-tongs, if they were necessary to be used in loading the truck, were close at hand. The tie-tongs were just as available to the men as was the lining bar. The men selected the lining bar rather than the tongs to do the work. Both tools were at the same place where the men had been working prior to loading the truck. The

decision in the *Ferguson* case was based entirely on the fact that the ice chipper, a safe instrument with which to remove the hard ice cream, was not furnished. If the ice chipper had been furnished in the *Ferguson* case as the tie-tongs were furnished in the *Crookham* case, the Court would have held that there was no jury question presented.

(3) The Charge:

"In requiring an employee in the absence of a foreman to load by hand an old fashioned, high-bedded non-dump truck (standing four feet high) instead of an ordinary truck (three feet high) with heavy water-soaked ties."

The Answer:

As previously shown in this brief there is no evidence that the Sayre truck was either old-fashioned or not an ordinary truck or that the ties were water-soaked. There is no evidence by the doctors that lifting the ties an extra foot produced the detached retina. The tong handles were 17½ inches high and if the bed had been three feet high and tongs had been used, the workmen would have had to lift 5½ inches higher to load a 3-foot bed with tongs than they would have had to load the ties by hand on a 4-foot bed. Both plaintiff's doctors testified that ordinary labor could produce a detached retina in a person of Crookham's age and who like Crookham was nearsighted. This being true there is no evidence that Crookham would not have suffered detached retina had the men used tie-tongs or had the bed of the truck been only 3 feet high or even 2 feet high. The same men, including Crookham, experienced no adverse effect in loading the same truck in the morning without tongs, and if the men or any of them had thought that tie-tongs would have been helpful, needful, or necessary in loading the ties in the afternoon some of the men would have suggested their use. There is no evidence, however slight, that Crookham's retina

would not have become detached if he had been doing just ordinary work. It could have occurred from stepping down from a curb or stepping down from a rail on to the ground or without any extra exertion. One is just as probable as the other. It is a physical fact that less energy is expended in lifting an object from an elevation 3 feet to 4 feet than it is to lift the same object from the ground to a distance or height of 1 foot. In one instance a person is bending over to do the lifting, in the other he is standing upright.

(4) The Charge:

"To permit the work buddy of Ray Crookham to leave the job to assist the truck owner in rolling back ties being loaded on his truck, thus increasing the lifting load and the burden upon the petitioner."

The Answer:

When one of the men was assisting in rolling the ties forward on the truck, there were three men left to load the ties which was only about 1/3 of the time, but even so, each workman would be lifting the maximum of 73.3 pounds for the heaviest tie and 43 pounds for the lightest tie; therefore, the three men were loading no heavier objects than Crookham, as he testified, had done many times before. He, in fact, was the largest of the men loading the ties.

Crookham, in loading the ties on the Sayre truck, was not lifting any more weight than he was at times when he, alone by himself, or at other times with another employee, lifted a tie from the ground and put it in a post hole (R. 83), while they were building fence, both the morning before and the day before the men loaded the Sayre truck. The undisputed medical testimony is that when "you tighten your abdominal muscles you send more blood up to your head and even the blood vessel can

be a factor in that kind of thing" (R. 252) The adominal muscles would be tighter when one leans over to pick up a tie from the ground and in raising it the first two feet than they would be in lifting the tie the third or fourth foot from the ground. Consequently, the proof, even the slightest, in this case does not "justify with reason the conclusion" that three men lifting the ties by hand on the Sayre truck produced an injury. The facts of this case do not meet the test of the *Rogers* case for jury submission.

We have been unable to find a F. E. L. A. case involving a detachment of a retina. There are several F. E. L. A. heart attack cases, none of which has been passed upon by this Court. In *Creamer* v. *Ogden Union Ry. & Depot Co.*, 121 Utah 406, 242 P. 2d 575, certiorari denied January 5, 1953, 344 U. S. 912, 97 L. Ed. 703, 73 S. Ct. 333, a workman suffered a heart attack while performing his duties and recovery was denied because of lack of foreseeability and consequent failure to satisfy the requirement of proximate cause. This Court, in *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 187 L. Ed. 610, 63 S. Ct. 444, 451, held that the employee must prove that the carrier was negligent and "that negligence was *the proximate cause of the injury.*" (Emphasis supplied). In *McGuigan* v. *So. Pacific* 112 C. A. 2d 704, 247 P. 2d 415, the employer knew that McGuigan had previous heart attacks but nevertheless assigned him to do a job which was more strenuous than the type of work the company doctor had recommended that he do, and as a result he had another heart attack and died. The Court stated (on page 421) that:

> "If there is any substantial evidence or reasonable inferences therefrom that would sustain findings of negligence and proximate cause, it is error to grant a non-suit. * * * The employer knew that decent (sic) had a diseased heart. The employer

> knew that twice decedent had been hospitalized for that condition. * * * When * * * (the superintendent) * * * made these representations * * * (he) * * * knew that the duties of herder were more strenuous than he had represented. * * * *It is perfectly true that there is no duty imposed on an employer to examine his employees to ascertain if they are physically fit to do the job they seek.* The case of Potter Title & Trust Co. v. Ohio Barge Line, D. C., 81 F. Supp. 108, which imposed such a duty, was reversed—3 Cir., 184 F. 2d 432, certiorari denied, 340 U. S. 955, 71 S. Ct. 567, 95 L. Ed. 689. But here the employer not only voluntarily assumed the duty, but, much more important, took it upon itself to describe the duties decedent would assume, and did so negligently." (Emphasis supplied).

In the Crookham case, no one knew of the latent condition of his left eye, not even his doctor, his employer, any of his fellow workers or himself. The fact that made the *McGuigan* case a jury case was the foreknowledge, by the employer, of the condition of McGuigan's heart, who, in spite of that knowledge, assigned him to duties which were likely to, and did cause another heart attack. In *Herdman* v. *Pennsylvania Ry., supra,* decided the same day as the *Rogers* case, this Court held:

> "In an action under the Federal Employers' Liability Act (45 USC ss 51 et seq.) to recover for injuries to a railroad conductor who fell when the train on which he was employed stopped suddenly to avoid striking an automobile, no jury question as to the negligence of the railroad is presented under the doctrine of res ipsa loquitur where there is no evidence that the stop was made with any special or unusual severity or that unscheduled and sudden stops of trains are *unusual or extraordinary*, and the conductor himself testified that such stops are not unusual or extraordinary." (Emphasis supplied.)

It will be noted that this suit was to recover for injuries to the railroad conductor who suffered the injuries when the train was put into emergency.

In the Crookham case, there is no evidence that it was not customary for section employees, whether three or four men, to lift ordinary railroad ties, or that it was "unusual or extraordinary" for three or four men to lift ordinary railroad ties. We, therefore, respectfully submit that under the holding of the *Rogers* case and especially the *Herdman* case, the lifting of ordinary railroad ties by three men or four men did not create any strain of "special or unusual severity" nor was the manner in which they were loaded on the Sayre truck by the employees in this instance "unusual or extraordinary". In fact, Crookham himself testified that previously two men and at times he alone would lift up similar ties and place them in the post holes that they were digging when they were repairing the fence along the right of way. There being nothing unusual or extraordinary in the work, and there being nothing special or unusual in the strain, consequently, under the holding of any of the cases decided by this Court since February 25, 1957, when the more liberal doctrine was laid down, the petitioner did not make a case to be submitted to the jury, and it was error for the trial court to let the case be so submitted.

In *Bennett* v. *Southern Ry. Co.*, 245 N. C. 261, 96 S. E. 2d 31, (F. E. L. A.), a brakeman was fatally struck by lightning when he was instructed to leave the "caboose" and, during an electrical storm, to perform a task near the track. The Court held that railroads are not insurers of their employees and that if ordinary experience would not have required a railroad to anticipate and provide against such a happening, then there could be no liability upon the railroad company, in that the accident was not a foreseeable one. The Court pointed out:

> it is significant that there is no evidence that the lightning of the storm struck any person or object, with the exception of the tragic death of plaintiff's intestate, ". . ". The test is whether reasonable men, examining the circumstances there and then and the likelihood of injury from lightning, would have ordered the train crew and plaintiff's intestate to make a move and pull the loaded cars out. In our opinion, after considering all the evidence in the light most favorable to plaintiff, and accepting it as true, and giving her the benefit of all reasonable inferences to be drawn therefrom, the only reasonable conclusion at which fair-minded men could arrive is that the danger at the time and place of being struck by lightning was so remote as to be beyond the requirement of due care, and, therefore, the death of plaintiff's intestate was not caused in whole or in part by any negligence on defendant's part. *Bare possibility is not sufficient.* Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. *'Events too remote to require reasonable precaution need not be anticipated.'* Brady v. Southern R. Co., supra, (320 U. S. 476, 64 S. Ct. 236). *To hold otherwise would be to make defendant an insurer.*" (Emphasis supplied.)

In *Southern Ry. Co.* v. *Bell* (1940, 4th Cir.), 114 F. 2d 341, an employee committed suicide by jumping in front of a train. In holding that the railroad company was not liable for such death, the Court stated that:

> "One is liable for only those consequences which in the light of attending circumstances could reasonably have been anticipated by a prudent man but not for casualties which, though possible, were held improbable." (Syl. 1, p. 341.)

The same work performed in the same manner by Crookham in the morning produced no adverse effect; neither he nor any other employee made any complaint to the foreman about the work; consequently, the fore-

man could not have anticipated that lifting ties in the afternoon, in the same manner, would have produced the detachment of the retina of Crookham's eye.

It is true that there are a series of strained back and hernia cases; but in the ones where recovery has been allowed, the objects lifted which produced the strain that caused the hernia or strained back, have been weights which normally have not been lifted by such men, and usually on occasions where the employee protested but was ordered to lift anyway. Typical of such type of cases is *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 S. Ct. 358, reh den 345 U. S. 4, 97 L. Ed. 1348, 73 S. Ct. 639. In the Crookham case both a lining bar and tie-tongs were available. They were on the company truck where the men were working building fence, and the men could take either one or both of such tools, if they thought it was necessary, useful or convenient to use them. The same method of loading ties was followed in the afternoon as in the morning, and at noon-time, neither Crookham nor any of the other men made any complaint, report or suggestion to the foreman that only three men were used at times instead of four.

In *Stewart* v. *B. & O. Ry. Co.*, 137 F. 2d 537, relied on by the petitioner, the facts are different than the facts here. However, Justice Hand, in deciding that case, stated:

> "Doubtless an employee cannot recover damages for every harm he may suffer through failure of his employer to provide him with the best sort of appliance unless the situation is such that the chance of injury can be *reasonably foreseen.*" (Emphasis supplied.)

We believe that the chance of injury to Crookham (even assuming that the detachment of the retina was an injury) could not have been reasonably foreseen by the foreman (the employer) when the foreman, as Crookham admits,

had sent sufficient men to load the ties; when all the men loading the ties were experienced section men, two of whom have been foremen; when no complaint was made by anyone as to the manner of loading the ties in the morning, or at any other time; when the weight that each man lifted was not more than the average section man, as well as Crookham, had often lifted before; and, when all the other men and the foreman testified that the way the ties were loaded was the safest way in which to load them.

It is the sole theory of petitioner Crookham that he had the detachment of the retina when he had the burning sensation, like sweat in his eye, after loading the second load of ties. His doctors say that such a burning sensation or pain was not produced by the separation of retina, for pain-wise one does not know when the retina separates. Take this alleged incident out of the case and petitioner does not have the least conjecture when the detachment occurred. There is no competent evidence as to when the retina detached.

After a diligent search, we have found no (FELA cases) involving a detached retina. However, even in Workmen's Compensation cases, *where no question of negligence is involved*, compensation has been denied to employees when there is no evidence of trauma to the eye, and the detachment of the retina occurred, as it did in this case, from the doing of ordinary work which the employee was employed to do.

In *Industrial Commission of Ohio* v. *Auler*, 49 Ohio App. 12, 194 N. E. 887, (1934), the Court held that such a detached retina was not an injury within the meaning of the Ohio Compensation Act. It will be noted that the Federal Employers' Liability Act applies only to "any person suffering injury". If Crookham's detached retina

was not an *injury* which he received in the course of his employment, no recovery can be had under F. E. L. A.

The facts in the *Industrial Commission of Ohio* case are:

Claimant and a fellow worker were carrying an angle iron weighing 150 pounds, a task similar to his past regular duties, when he suddenly became blind (hemorrhage of the retina).

In holding the injury not accidental, the Court said:

> "[It would not] seem that his condition was the result of a physical injury accidental in origin and cause. It is not claimed that he received any physical injury by striking or being struck by any angle iron, or by any other object, or that anything unusual occurred except that he tripped and fell as a result of dizziness a half hour before his vision failed. He was engaged in his usual employment, doing his work in the usual way. If it be said that the repeated lifting and carrying of angle irons was such work as induced (claimant's) affliction, then in the words of the Supreme Court (of Ohio) * * * 'Impairment of physical condition accruing from constant and continued labor, no matter how heavy or arduous it may be, is not covered by the Workmen's Compensation Law. Such impairment does not come within the meaning of the term "injury"' * ".

It will be noted that in the above case two employees were lifting 150 pounds, which would be 75 pounds each. In the present case, Crookham testified that the ties weighed from 125 to 220 pounds, depending on the size, which would make the average weight for three employees for the largest tie 73.3 pounds each.

In *R. G. Le Tourneau, Inc. v. Industrial Commission*, 396 Ill. 435, 72 N. E. 2d 183 (1947), involving a claim for loss of sight in one eye caused by a detachment of the

retina. Claimant contended that this detachment was caused by strain of lifting incident to his work. After two hours of work during which he handled 130 2-pound castings and 51 1-pound castings, he went to a shop meeting on the premises. He had suffered no accidents or noticeable symptoms of any kind, yet when he was reading cards at the meeting, he noticed he could not see out of his right eye. There was medical testimony that retinal detachment such as claimant suffered could be caused by a blow or the strain of heavy lifting, or by old age or debilitating diseases. While the doctors were in general agreement as to the possible causes, they could not state definitely how claimant's injury occurred except that it *could* be caused by strain or *trauma*. In reversing a judgment confirming an award of compensation, the Court held that "There is no testimony * * * that the work performed by the claimant caused the injury".

Other compensation cases dealing with a detachment of a retina of similar import and like holding, from appellate courts of Arizona, California, Pennsylvania and New York, as well as a fuller statement of the *Auler* and *Le Tourneau* cases, are set out in the Appendix to this brief. (See Appendix, pages 40-45.)

The respondent is fully cognizant of the fact that this is a case tried under the law of negligence, *as changed and amended* by the Federal Employers' Liability Act; and that the failure of some appellate state Courts to observe and abide by these changes and amendments have resulted in placing an undue and untoward burden upon this Court. However, even under the F. E. L. A., recovery is dependent upon proof of "any negligence", "proximate cause", "foreseeability" and "injury". The Supreme Court of West Virginia, with the *Rogers* and subsequent cases fully in mind, has intently perused the record of this case in search of these requirements, and

has found it wanting. It is respectfully submitted that the opinion of the Supreme Court of Appeals of West Virginia is fully in accord and not in any way in conflict with the opinions of this Court in Federal Employers' Liability Act cases and that the writ of certiorari as prayed for should be refused.

Respectfully submitted,

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APPENDICES

APPENDIX A

Supplemental and Corrective Statement of Essential Facts of Case

Crookham had worked for The New York Central Railroad Company and its predecessors since 1913. At various times he had been an assistant section foreman, a section foreman and section hand. His duties consisted of the usual duties of section hands on railroads, such as removing ties from the roadbed, replacing old ties, replacing broken rails, repairing tracks, maintaining track along right of way, etc.

Prior to December 28, 1955, the Company maintained a passing-track near Beech Hill, Mason County, West Virginia, but, as the same was no longer necessary for its operations, it was being removed. In fact the rails had already been removed and the old ties were either being used for fence posts to repair fences along the right of way, given to farmers for fence posts or other uses, or being burned along the right of way.

On December 27, 1955, a Tuesday, several of the section crew were removing some of these ties from this passing-track and burning them. Others were digging fence-post holes along the right of way. The section crew at that time consisted of a foreman and seven employees, an eighth employee being away on vacation. On December 28, the section crew was building a fence along the right of way. The crew had left its section headquarters at Arbuckle, West Virginia, about 7:00 A. M., and proceeded west on U. S. Route 35, about four and a half or five miles to the Beech Hill passing-track, in the railroad company truck. This truck was used for the purpose of transporting men to and from work, as well as transporting various types of equipment used in railroad work, such as tie-

tongs, lining bars, picks and shovels. This truck was parked along the right of way where the men were working, and it was from it that they obtained the various tools used by them in their work. The men started work, building fence, as soon as they got on the job. About 9:00 A. M., a storekeeper and part time farmer by the name of Everett Sayre drove his Dodge flat bottom truck to where the men were working, and asked the foreman if he, Sayre, could have some of the ties that were being removed from the passing-track. The foreman, Whittington, informed him that he could. Sayre then drove his truck from U. S. Route 35 over onto the right of way, which paralleled U. S. Route 35 at that point, and onto the passing-track, where he backed it up to the roadbed where the ties were. The foreman, Whittington, requested four of the crew, of which Crookham was one, to help Sayre load his truck. Since all the men were experienced section men, no further instructions were given as to what tools were to be used. The foreman stayed with the other three members of the crew who were getting brush out of the fence row. One of the four men took from the tool truck, which was located close to where the men were working, a lining bar (crow bar), which is a long steel bar customarily used in aligning track. This bar was taken for the purpose of prying out of the roadbed any of the ties that might yet be stuck in the ballast after the rails had been removed. The ties varied in mass and, in their wet condition, weighed from 125 up to 220 pounds (R. 80). The method of loading the ties, after they were pried loose, was this: One man would be on one end, one on the other and two in the middle, and they would lift the tie up and put it on the back of the bed of the truck, which was four feet above the ground; the ties would then be pushed forward on the truck bed; sometimes, while the truck driver and one of the crew was pushing the ties forward, the other three men, one on each end and one in the middle, would lift the ties from

the ground onto the truck (R. 78, 79); after a few ties would be loaded the truck would be backed up so that it would be close to where the ties were located on the ground.

The plaintiff, in his testimony, insinuated, but did not definitely say, that the crew should have used tie-tongs to load the truck; however, the four men, besides Crookham, who loaded the ties on the truck, all testified, including plaintiff's witness Roy B. Hayes, who was 56 years of age and had worked for the railroad since 1917, that the easiest way to load the ties on the truck was by hand and not by use of tie-tongs.

Hayes testified:

> "Q. In other words, the easier way to load the ties would be to use hands, wouldn't it?
> A. Yes, sir, it would be." (R. 149)
>
> * * * * * * * * *
>
> "Q. The reason you didn't take any (tie-tongs) to load the truck you thought it was easier to load with hands than with tongs, did you not?
> A. Well, yes." (R. 151)

Harold Luikert, a witness for the defendant, who loaded the truck both in the forenoon and afternoon, testified:

> "Q. Did you use any tie-tongs in loading these ties (on the truck)?
> A. No, sir.
> Q. Why?
> A. * * * I thought it would be easier to take our hands to throw them up. If we threw them, it is half foot or foot more higher with the tongs.
> Q. Then, if I understand, the way you loaded was easiest and best way to load (ties).
> A. That's right." (R. 189)

H. E. Dunlap, witness for the defendant, who loaded the truck in the afternoon only, testified:

"Q. Did you use tie-tongs in loading the Sayre truck?

A. No.

Q. Why?

A. It would have been impossible to load a truck like that with tongs.

Q. Explain to the jury.

A. The truck was high and the tongs when you pick them up, you see, you get about that much higher, about fourteen inches above when you work tongs on ties. Then your hand reach is up here, but when you are lifting with your hands, why you just get it up there. Loading by hand it loads easier." (R. 199)

* * * * * * * * * * *

"A. That is the easiest way to get them on the truck, was to pick them up by hand and throw them up on there." (R. 200)

Ernest Plants, witness for the defendant, testified:

"Q. Was any instructions given about what tools you should take or not take?

A. No, sir.

Q. Why didn't you take some tie-tongs along?

A. Well, we didn't need them in my opinion.

Q. Why?

A. This truck, he backed right down where the side track we was loading. Tie-tongs would have been no benefit to throw them up. If you had tongs even four men would have to lift as high as his head to get them on the truck with tongs.

Q. Then you would say that it was easier to load without tongs?

A. To use tongs to throw them up was practically impossible on this truck." (R. 206)

L. T. Whittington, foreman, testified:

"Q. Now, what is the safest and the easiest way to load ties on the truck which Mr. Sayre had?

A. By hand.

Q. In what way? How by hand?

A. By just taking a bar, loosening the tie, picking it up, tossing it on the truck. If you take tongs, you have to lift above your head to stack them on the truck." (R. 216)

Crookham testified:

"Q. You had loaded ties before without tongs?
A. Not on a high truck like that. I had on push cars, yes." (R. 77)

When Crookham took the ties from the road bed to the fence line for posts sometimes he would do it by tongs, sometimes by hand. He testified on direct examination.

"Q. How were you lifting those ties on this morning from the road bed to the right of way of the fence, by hand or by tongs?
A. Sometimes by hand and sometimes by tongs.

When the men were lifting the same kind of ties from the ground and putting them in the postholes, two men would do it and sometimes one would do it. Crookham testified:

"A. Most of the time two men picked it up and put it in the hole.
Q. Sometimes one man would, wouldn't he?
A. Yes." (R. 83)

Crookham at the time weighed 165 pounds and the other three men were smaller. All were about the same age, and had many years of experience as section men. Crookham, himself, had been a foreman. Plants, one of the other employees (although he was employed as a section laborer at the time of the accident), had been a foreman before the accident and was acting as foreman at the time of the trial. These men had worked with one another as a section crew over a period of many years. All were familiar with the type of work being done. Their specific

weights and ages were: Plants, age 56, weighed 135 pounds; Luikert, age 58, weighed 145 pounds; Dunlap, age 58, weighed 145 pounds; and Crookham, age 61, weighed 165 pounds.

After the ties were loaded upon the Sayre truck, Sayre drove the truck away and the men returned to their other work. In the afternoon Sayre returned for another load of ties, and the foreman, as he had done in the morning, directed that four men help Sayre load the truck. The instruction given by Whittington, the foreman, was that "Four of you men help Sayre load the truck", or words of similar import. These men, in a sense, volunteered for the work. One of the men who helped load the truck in the morning did not load in the afternoon. Crookham, however, loaded on both occasions. All of the men, both the morning shift and the afternoon shift, were experienced section men who had done this work before and were familiar with the procedure and knew what to do and what tools to employ. There were sets of tie-tongs in the company truck which was located at the place where the men were working (R. 216). These tongs were available for the men if they elected to use them. However, all of the rest of the crew who loaded the truck, whether witnesses for the plaintiff or defendant, stated that it was much easier to load them by hand than to try to load them with the tie-tongs, as lifting with the tie-tongs would be more strenuous, in that the height of the lift would be 18 to 20 inches higher by the use of tie-tongs than without them. (A picture of the tie-tongs as an exhibit is in the record). Moreover, Crookham testified that he had previously loaded ties for himself on a truck with three men by hand and without tongs (R. 86).

The men, including Crookham, selected their own tools. They selected a lining bar and not tie-tongs to do the work. It is clear that the lining bar was determined by the men to be the satisfactory tool for the work to be done, since

they selected the same tool to do the identical work in the morning and in the afternoon. Both tools were available; they could have selected either or both.

Crookham testified that they had enough men to load the truck and there was nothing unusual in a section man lifting 100 pounds (R.81). He further testified that, although he wore glasses to correct his vision, he knew of no defect of his eyes prior to this time (R. 85, 87). No one else in the crew, including the foreman, knew of any defect in Crookham's eyes (R. 220). Crookham contends that due to lifting the ties, the retina of his left eye became detached, and as a result of the operation in re-establishing the detached retina he became blind in the left eye.

The next morning, December 29, when he got up to go to work, he discovered that his left eye was blind. He reported this fact to his foreman, and the foreman inquired as to whether or not he wanted to go to see a doctor. He said he did not, that he thought he had gotten something in his eye, and that it would be all right. That day the crew built fence. The next day, December 30, Crookham, along with other employees, patrolled the tracks with a motor car to inspect the rails, ties, joints, etc. On Saturday, the 31st, Crookham went to see his oculist, Dr. Nibert, who previously had fitted him for glasses. During the examination Dr. Nibert discovered that Crookham had a detachment of the retina of the left eye. The doctor sent him to Dr. Pensmidt, an ophthalmologist at Gallipolis, Ohio, who confirmed the diagnosis and had Crookham return to the hospital Saturday night, December 31, where he remained until January 5, 1956, when the operation was performed that resulted in the re-attachment of the retina, but the left eye was left blind.

In an attempt to attribute the detachment of the retina to the lifting of the ties, Crookham testified that, on the

afternoon of December 28, while he was loading the ties on the truck, he had a burning sensation in his eye. Crookham testified (R. 55):

> "A. I started to lift a tie. I reached down got it. It was a heavy one, a real heavy tie; I lifted it up. It just felt like salt in my eye. It wasn't a sharp pain—just a kind of burning sensation. * * * I took off my gloves and wiped my glasses.
>
> * * *
>
> A. It was just like it was blurred, like scum on my eye."

However, his doctor, Dr. Pehsmidt, who took notes of his conversation with Mr. Crookham, testified:

> "Q. Now, doctor, whatever the day that he woke up and complained of the loss of vision, the night prior to that he told you that he had flashes of light in the eye?
>
> A. Yes, sir.
>
> Q. That is the only previous history that he gave you of having any injury to his eyes?
>
> A. That wasn't history of injury to his eyes, was it?
>
> Q. Whatever it was, the occurrence, occasion, phenomena, that is the only thing he mentioned?
>
> A. Without probing? Essentially that is correct." (R. 110)
>
> "Q. He didn't tell you that the day previous to the time he woke up in the morning (without sight) that he had a burning sensation in his eye, did he?
>
> A. If he did, it doesn't appear in my record.
>
> Q. If he had made such a statement to you, would you have had it in your record?
>
> A. It would have made no significant difference in relation to a retinal detachment.
>
> Q. If he had said he had a burning sensation, you would have put it down?
>
> A. I probably would have put it in on the record.
>
> Q. If he had flashes in his eye when he was supposed to be lifting ties and had told you?

A. I would have definitely put it on. When he has had burning sensation again, I would have paid no attention to it. The retina has no nerve fibers, no pain fibers.

Q. On detachment of the retina there is no pain?

A. No. It can't happen. Pain-wise you just don't know you got it." (R. 110). (Parenthetical language supplied.)

The flashes of light Crookham had on going to bed on the night of December 28, 1955, is some indication that the retina separated from the eye at that time. Dr. Pensmidt testified:

"Q. Now, these flashing of lights is some indication that the retina at that time is going through the process of separating from the other wall?

A. In many cases that is true, in others, no." (R. 111).

A detached retina can be caused by a number of things, a nearsighted person, such as the plaintiff and at plaintiff's age, can have a detached retina by lifting ordinary weights in the course of a day's work, and Dr. Pansmidt testified:

"Q. You also know, do you not, doctor, that a person who is nearsighted and who has had a certain amount of deterioration due to age, could have a detached retina with a very slight amount of physical energy?

A. I think that is true.

Q. It wouldn't be necessary for him to be lifting any object, just average labor, that could do it?

A. It could." (R. 105)

On direct examination, Dr. Pensmidt testified:

"A. * * * He (Crookham) further stated that on the previous night he had noticed a brilliant flash of light like lightening *(sic)* on going to bed. On the previous day, that is the day before, he said that he had been doing heavy lifting of railroad

ties; that he had never done any other type of work.

Q. So he said that he had been lifting railroad ties the preceding day?

A. Yes." (R. 97) (Parenthetical language supplied.)

"Q. Doctor, assuming and bearing in mind the history taken and your objective findings and the subjective complaints that were given to you by the patient, do you have an opinion as to whether or not the lifting of the cross-ties as described to you by the patient could have been the inciting or producing cause of the detachment of the retina?

* * *

A. Yes, I do believe the lifting of the cross-ties could have been the inciting cause." (R. 102)

On cross-examination, Dr. Pensmidt testified:

"Q. I believe you stated that he (the patient) had arteriosclerosis in keeping with his age, which at the time was 62?

A. Yes, sir.

* * *

Q. And nearsighted persons are more prone to have detached retina than farsighted persons. That is your observations and according to reports made by persons who have made a study in this particular field?

A. Yes, sir.

Q. Now, a person can have a detached retina from a very minor lift, can they not?

A. Yes, sir."

* * *

"Q. You also know, do you not, doctor, that a person who is nearsighted and who has had a certain amount of deterioration due to age, could have a detached retina with a very slight amount of physical energy?

A. I think that is true.

Q. It wouldn't be necessary for him to be lifting any object, just average labor, that could do it?

A. It could.

Q. *Of course, you don't know what caused this one?*

A. *No, sir.*" (R. 104-106) (Emphasis and parenthetical language supplied.)

"Q. Sometimes you have had detachment from, in your observation and study, from young persons jumping hurdles. There are cases from persons stepping from one step down to the other. Jar would be the trigger that sets it off?

A. That is right." (R. 108)

Dr. M. K. Humphries, Jr., and the only other ophthalmologist testifying, testified as follows on direct examination:

"Q. Doctor, from the history that he gave you of lifting heavy cross ties and the attendant pain that followed, and your examination of him on May 3, 1957, what is your opinion as to the cause or connection between his aiding in lifting the cross ties and the detachment of the retina of his left eye?

* * *

A. I would like to say something about retinal detachment in preference to answering this question.

It certainly is true that most retinal detachments occur somewhere after fifty years of age and about two-thirds of them occur in nearsighted individuals.

A retinal detachment can be due to direct trauma; somebody might hit you in the eye with a rock and rupture your eye ball; it can be due to a severe bruise. That is something that we all see. But then, there are a lot of indirect ways of getting a retinal detachment. And sometimes it is hard to answer in a categorical sort of way because as people get older there are changes that occur and there are changes that occur in the retinal.

Now, with a nearsighted eye and being sixty years old plus, it is not inconceivable to think that this man may have had some degenerated changes in his retina, whether you can see them or whether you can't see them. And, to back this up, eyes

have been examined in a pathological laboratory to demonstrate this fact.

And, then comes the question of what in the world does this have to do with a detached retina, because you can get a detached retina from so many things. You can just lift something heavy and maybe the increased volume of blood in your eye can cause enough dispension of a weakened point in a retina to cause a break in it, and that has been proven. The literature on opthamology will point to that fact and it is an accepted fact in opthamology that strain, heavy physical exercise, and even coughing in—and this is the trick point—in an eye, that is, predisposed, can be the deciding factor which precipitates the detachment.

Now, you are asking me and Mr. Crookham asked me, whether I thought lifting those railroad ties caused his retina to separate. And I told him that was a hard question to answer. But I recently discharged a patient from the hospital who, during a coughing spell, separated an entire left retina. And I have had them in the office from lifting sacks of wheat and strain which causes retina detachment.

And it is not beyond my belief that this could have been a factor. Not the main actor, but a secondary factor, which contributed to his retinal separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 241-243)

On cross-examination, Dr. Humphries testified:

"Q. In other words, Doctor, those retinal detachments you can sometimes trace them to trauma and sometimes you can't, sometimes, especially with older people, a very slight amount of pressure will produce it?

A. Well, that is true, and that's the reason I say that it is hard to make an absolute statement because moving a table, lifting, and things like that can. Of course, you tighten your abdominal muscles

you send more blood up to your head and even the blood vessel can be a factor in that kind of thing.

Q. This could be true, too, could it not, by way of illustration, in a laymen's way: Take a shoestring that's new and put it in a pair of shoes and it can stand quite a bit of strain. As it gradually wears and gets older sometimes it is a very small amount of pressure will cause it to break. That illustration is not inapt in connection with detachment of a retina, especially these people who are predisposed to have it.

A. That is quite true." (R. 252).

"Q. * * * And is it not also true that a person can have a detached retina, especially those after they get fifty, when they don't have any extra exertion, but it may come with a normal amount of exertion?

A. That's true." (R. 246)

There is no medical evidence that if there had been four or six men and all equipped with tie-tongs that Crookham would not have experienced a detachment of the retina of the left eye. Crookham experienced no difficulty in loading the same kind of ties in the morning as in the afternoon. The same strain in loading ties would be put on the right eye as on the left eye. The retina of the right eye did not detach while loading the same ties.

Crookham testified that before this occasion he had sweat in his eyes which caused a burning sensation, as follows:

"Q. When you get sweat in your eyes that causes a burning sensation, doesn't it? You have had sweat cause a burning sensation?

A. Sure." (R. 73)

It is interesting to note that although Crookham had a hernia at the time of loading the ties, no complaint was

made that the lifting of the ties put any strain on his hernia or injured it in any way. (R. 85). The work of loading the ties was nothing unusual.

Crookham testified (R. 81) as follows:

> "Q. In fact, you had enough men there to do that kind of work?
> A. That is about what they always send is four.
>
> * * *
>
> Q. One man on the section could lift 50, 60 or 70 pounds, couldn't he without any difficulty.
> A. Why, yes.
> Q. If a tie weighed 200 pounds and one man was on one end and another man on the other end that would be 100 pounds a piece?
> A. I suppose so.
> Q. If a man was in the middle that would make about 66 pounds a piece?
> A. Yes.
> Q. Nothing unusual for a man on a section to lift 100 pounds is there?
> A. I have done it.
> Q. Nothing unusual is it?
> A. No, that is right."

APPENDIX B

Abstract of Compensation Cases Dealing with Detachment of Retina Referred to in Respondent's Brief

(1) *R. G. Le-Tourneau, Inc.* v. *Industrial Commission*, 396 Ill. 435, 72 N. E. 2d 483 (1947).

This case involved a claim for loss of sight in one eye caused by a detachment of the retina. The claimant contended that this detachment was caused by the strain of lifting incident to his work. He had been employed for about a year in dipping metal castings, weighing from one to fifty-five pounds, in a paint tank and then hanging

them on metal hooks on a rack to dry. The hooks were about level with his nose and two and one-half feet in front of him. Sometimes the heavier castings would tend to slip off the hooks, and it would require some strain to keep them from slipping. During an eight hour day he would handle castings weighing a total of 4,000 to 6,000 pounds. On the day in question he had handled no heavy castings. After two hours' work, during which he handled 130 2-pound castings and 51 1-pound castings, he went to a shop meeting on the premises. He had suffered no accidents or noticeable symptoms of any kind, yet when he was reading cards at the meeting, he noticed he could not see out of his right eye. There was medical testimony that retinal detachment such as claimant suffered could be caused by a blow or the strain of heavy lifting, or by old age or debilitating diseases. While the doctors were in general agreement as to the possible causes, they could not state definitely how claimant's injury occurred except that it *could* be caused by strain or trauma. In reversing a judgment confirming an award of compensation, the Court held that there was no proof of an accident and that the award was against the manifest weight of the evidence. The Court said: "There is no evidence * * * connecting the injury complained of with any accident occurring on the morning in question. There is no doubt but what the employee * * * suffered a detached retina causing the loss of sight in the right eye, but there is no evidence on any hand to connect the injury with the work which was being done. * * * There is no testimony * * * that the work performed by the claimant caused the injury. The testifying physician stated only that strain *could* cause the detached retina. * * *" (Emphasis supplied).

(2) *Industrial Commission of Ohio* v. *Auler*, 49 Ohio App. 12, 194 N. E. 887 (1934).

This case involved a claim by a carpenter's tender for blindness from hemorrhage of the retina caused by continuous heavy lifting. On the occasion in question the claimant and a fellow worker were carrying an angle iron weighing 150 pounds when the claimant suddenly became blind. However, in reversing a judgment awarding compensation and rendering a judgment denying the claim, the Court held that the injury was not accidental. The Court said: "[I would not] seem that his condition was the result of a physical injury by striking or being struck by any angle iron, or by any other object, or that anything unusual occurred except that he tripped and fell as a result of dizziness, a half hour before his vision failed. He was engaged in his usual employment, doing his work in the usual way. If it be said that the repeated lifting and carrying of angle irons was such work as induced (claimant's affliction) then in the words of the Supreme Court (of Ohio) 'Impairment of physical condition accruing from constant and continued labor, no matter how heavy or arduous it may be, is not covered by the Workmen's Compensation Law. Such impairment does not come within the meaning of the term *injury*.'" (*Parenthetical language supplied*).

(3) *Powers* v. *Consolidated Vultee Aircraft Corp.*, 61 Ariz. 362, 149 P. 2d 668 (1944).

This case involved a claim for detachment of the retina of the right eye alleged as a result of jumping two feet from the fuselage of an airplane to the concrete floor of the defendant's factory. Claimant, age 58, was employed as a fitter and oxygen mechanic and worked in fuselages in the airplanes. His work necessitated jumping out of turret holes in the bottom of the fuselages to the concrete floor of the factory, a distance of two feet. On the occasion in question he hurt his ankle and went to the first-aid station in the factory, receiving

treatment for a slight strain. Although he testified he felt a sensation in his eye at the time, he did not believe it of any importance and did not tell the doctor at the aid station. He worked regularly for 9 days, when he went to an eye specialist because his eye continued to bother him. The doctor observed a flat detachment of the retina in the right eye and asked him if he had been hit in the eye by anything or suffered any blow to the head. He could think of none. After persistent questioning by his doctor on a later occasion, he inquired if jumping out of the airplane could have caused it. The doctor was of the opinion that this was a probable cause of the detachment and was supported in his opinion, but other doctors expressed a contrary view, which the commission adopted in denying an award. In affirming the order denying compensation, the Court held that the decision was amply supported by medical testimony.

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(4) *Miller* v. *Lycoming Mfg. Co.*, 135 Pa. Super. 558, 7 A. 2d 22 (1939).

This case involved a claim for loss of vision in an eye caused by detachment of the retina. At the time in question, the claimant was breaking up scrap iron with a 15-pound sledge hammer, as he had done on an average of two hours a day for seventeen years, when he suddenly noticed that his sight was affected. He attributed this to his goggles and immediately asked for and was given another pair, but these failed to help. *The defendant submitted no testimony* and an award was entered in favor of the claimant. However, in reversing the judgment which affirmed the award, the Court held that the *claimant's own evidence* failed to establish either causal relation or accidental injury within the perview of the statute. The Court said: "Now, the claimant admits there was no direct blow on the eye, that is, that no foreign substance came in contact with the eye. * * * There was evidence

* * * that prior to (the day in question) the claimant enjoyed normal vision and good health. Several of the experts gave testimony * * * that the detachment of the retina insofar as it directly affected vision was caused by one of the very blows that claimant struck * * * as is described in his testimony. It does not follow as a necessary conclusion that claimant has suffered a compensable injury * * *. While he (the doctor) testified that in his opinion a blow struck with the hammer caused the final separation which reached a point where it was manifest by loss of sight, it occurred only by reason of a pre-existing weakness. He explained that the final effect might come from jumping from a wall and landing with a hard shock or riding over a railroad track in an automobile * * *. Viewing the testimony in the light most favorable to the claimant it was sufficient to sustain a finding that the effect of the blow struck on the scrap at the time (by the) claimant indirectly transmitted through the body of the claimant (the force which) caused the final detachment which resulted in the loss of the industrial use of the eye. At the same time the claimant proved that indirect trauma will not cause a detachment of the retina unless there is a predisposing condition, and when such condition exists the detachment may be advanced by any movement which transmits force through the body to the eye. With the predisposing condition, the final disaster might occur while riding in an automobile over a rough road or even while lying in bed. *Direct trauma may cause a detachment without any predisposing condition, but there was no evidence of direct trauma, and it is not even suggested that there was a direct blow to the eye or contact of foreign substance with it.* Such being the evidence, it follows that the injury was not due to an accident as defined by the statute. * * * Not only has the claimant failed to prove an accident, but he has affirmatively shown that his injury is the natural culmination of

a progressive weakness in the eye." (Emphasis supplied). In the Crookham case, Dr. Humphries says that lifting of railroad ties was, "Not the main factor, but a secondary factor, which contributed to his retina separation. The main factor, of course, would be the degenerated changes of old age, nearsightedness. Those two would be the main factors." (R. 243)

(5) *Wood* v. *W. E. Joyce Co., Inc.*, 228 App. Div. 729, 239 N. Y. Supp. 110 (1930).

In this case the claimant, a carpenter, fell from a ladder while at work, landing in a sitting position. He regarded the matter as of little consequence and continued to work until he became suddenly blind while at work three weeks later. The cause of blindness was due to a detachment of the retina. There was evidence that the eye was bloodshot following the accident and there was some pain and blurring of vision. However, no doctor would go further on the question of casual relation between the fall and the detachment of the retina than to say it was "*possible*" to have been so caused. In reversing an award of compensation, the Court held that this was insufficient to sustain an award, stating that: [The doctors] say it is 'possible' but go no further. In the absence of other evidence leading to a reasonable conclusion this is not sufficient. * * * The finding that the detachment of the retina of the right eye arose naturally and unavoidably from the accident is not sustained by the evidence, and the award should be reversed * * *." (*Parenthetical language supplied*). (It is to be observed that in the above case the claim was denied, although there had been *actual trauma* to a part of the body.)

APPENDIX C

Pruitt v. N. & W. Railway, 188 Ky. 204 221 S. E. 552.

This was a F. E. L. A. action instituted by Pruitt against the railway company to recover damages for the loss of one of his feet, which he averred was the result of negligence upon the part of the railway company.

> "Pruitt was a section hand at the time of the injury suffered by him, and was engaged, together with others, under the directions of a section foreman, in repairing the track of a switch of the railway company near West Ironton, Ohio * * *. A tie in the road bed having decayed, it became necessary to remove it and to put a new tie in its place, and four of the section gang, with Pruitt among the number, were directed by the foreman to do this piece of repairing, while other members of the gang were engaged near by in similar work * * *. (All four of the men) * * * were individuals of many years' experience in that kind of work * * * (and one of them had previously been a foreman) * * *. Pruitt at the time was above 50 years of age * * * and he had frequently witnessed such work, and was well acquainted with the manner in which it was done * * *.
>
> "It does not appear that the foreman gave any particular directions to the men as to the method which they should adopt, or the manner in which they should remove the old tie and replace it with a new one. The foreman was immediately present when the work began, but before it was finished he had turned away and went about other duties, and was probably at a distance of 40 or 50 feet when * * * (in the process of removing the old tie, the accident occurred)." (*Parenthetical language supplied*).

After the plaintiff and defendant had rested, the Court directed a verdict for the defendant and the plaintiff ap-

pealed insisting that the defendant was negligent because that, among other things:

> "(1) The appellant was an inexperienced servant, and known to be such by the railway company * * * (and it failed to instruct him and warn him of incidental dangers). (*Parenthetical language supplied*).
>
> "(2) The foreman of the railway company failed to supervise the work and to direct the manner of its performance."

In affirming the lower Court's decision the Court considered plaintiff's contention, holding that:

> (a) "Where there are no hidden dangers, and everything about * * * (the work) * * * is such that an ordinary intelligent person will readily see and understand all the dangers incident to it, and to perform it there is no particular skill necessary; and nothing required but ordinary intelligence and physical strength sufficient to do it, there is no duty imposed upon the master to give instructions about the work, nor warnings touching it.
>
> (b) "Contention * * * (number two) * * * is not meritorious. It was a perfectly simple operation, and susceptible of performance by any person having ordinary intelligence and a sufficiency of physical strength to do it, free from intricacies, and not dangerous * * *. To require a foreman to stand immediately by and to give directions as to each action of the men, in so simple an operation and so well understood by the men performing it, and where the number engaged is so small, would carry the doctrine of necessity of supervision and direction to an absurd length." (*Parenthetical language supplied*).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF OPPOSING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Under the head of "Statement of Facts" in Respondent's brief, the Petitioner is accused of making "Many erroneous statements of facts". This accusation is respectfully denied. The facts set forth in the petition substantially conform to the facts contained in the Record. It may be true that the interpretations vary, but certainly there are no intentional misstatements.

Respondent complains of the use of the terms "high bedded truck". (P. 2 Respondent's brief). Yet the Respondent's brief contains admissions from its own witnesses that the truck was high. (P. 30 Respondent's brief.).

Q. "Did you use tie tongs in loading the Sayre truck . . .?"

A. "It would have been impossible to load a truck like that with tongs."

Q. "Why?"

A. "The truck was high . . .", (P. 30, Res. brief).

The one and only reason why the Respondent here deviated from its customary method of loading ties with tongs, was because this flat and high bedded truck *stood too high above the ground* to admit of tong use. This is indicated when the Respondent's witness said:

> "It would have been impossible to load a truck like that with tongs." (P. 30 Res. brief).

The respondent subjected the Petitioner to the task of lifting ties to the higher elevation, without tongs, a situation not contributed to or produced by the petitioner. The respondent adopted the situation as its own. The assumption of the responsibility carries with it the hazards of liability.

The Respondent has attempted to explain away the holding of the cases as set forth in Petitioner's brief, such as *Webb* v. *Illinois Central Railroad Co.*, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451; *Ferguson* v. *St. Louis-San Fran. Ry. Co.*, 356 U. S. 41, 2 L. Ed. 2d 571, 78 S. Ct. 671, and *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443. These, together with others, comprise a definite demonstration of the quantum of proof necessary to raise a question for the jury in the Federal Employers Liability Act cases, upon the issues of "duty and notice" (Webb case), "foreseeability" (Ferguson case), "negligence and proximate cause" (Rogers case). The Respondent's interpretation placed on these and other similar cases is strained and unreal. The case of *Herdman* v. *Penn-*

sylvania Railroad Company, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508, is not factually in point with the case at hand. The *Rogers* case represents that line of cases defining the quantum of proof necessary to raise a question for a jury. The *Herdman* case represents that line of cases defining the situation where there is no such question. In the *Herdman* case, the plaintiff by his own testimony, forecloses any inference of negligence, and of course in such a situation it is proper to direct a verdict for the defendant. The case at Bar is in the category of the Rogers case and the ruling of that case should govern the Court's action herein.

The *Herdman* case, supra, involved injuries suffered by a freight conductor in a fall to the floor of the caboose. The 67-car train was moving through a city at 8-10 miles per hour, when an automobile loaded with school children, crossed in front of the train. The Engineer in an effort to avoid collision with the children, applied the air brakes causing a rough stop. There was no evidence that the stop was made with any special or unusual severity. There was no mechanical failure of the braking equipment. There was no failure to furnish proper safety appliances of any kind. There was no evidence to show that the unscheduled and sudden stop of the train was unusual or extraordinary. The plaintiff testified: "We got to expect them or think about them". This amounts, in substance to admission on the part of the plaintiff that there was no negligence. This Court held, "the sole issue raised is whether a jury question was presented by the evidence under the doctrine of res ipsa loquitur".

With this decision it is agreed that a jury question was not presented by the proof. The *Herdman* case proof does not even meet the liberal test laid down by this Court in *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452, where an "inference" of negligence was used as the basis of recovery. The facts before the Court in the case at Bar are

different from the facts in the Herdman case. Here there is proof of many and varied acts of negligence. The jury so found, and their finding should not be disturbed.

RESPONDENT'S ADMISSION OF OWN NEGLIGENCE

1. The records of this case show that this Respondent ordinarily used dump trucks in the hauling away of ties from ballast beds (R. 48, 49), with the back of the dump truck bed lowered to approximately three feet above the ground and the ties carried by two sets of tongs to the truck and shoved in endwise. That such was the custom was admitted in Respondent's brief. (P. 2, line 7). Therefore, when the petitioner here was subjected to the lifting of ties without the use of tongs to a truck bed standing one foot higher than the customarily used company truck, this is the performance of an unusual task, and amounts to negligence.

2. Respondent admits that at least throughout a third of the time consumed by the loading of the ties here in question, there was only a three-man crew working. "The facts are that at least two-thirds of the time the ties were loaded on the truck with a four-man crew." (P. 3 Res. Brief). The inevitable inference is that during the other one-third of the loading time there were only three men working. The "work buddy" of the petitioner was permitted to leave his job. Thus, petitioner was required over a third of the time consumed in the loading of the ties (nearly four hours) to do a two-man job, the like of which he had never done before. This is an admission of negligence.

3. The Respondent admits: "It is true that there were only two sets of tongs on the job". (P. 3 Res. Brief). Since there were two crews operating at one and the same time—one taking up and loading ties, the other digging holes and setting posts—and since two sets (or pairs) of tongs are

necessary before four men can carry a tie, this is an admission of an insufficient number of tie tongs. Thus, a failure to supply sufficient tools.

4. The Respondent's brief (P. 28) admits that "the foreman stayed with the other three members of the crew . . ." (The crew referred to was the one setting posts). Since there was only one foreman in the crew, there was no other supervision available for the tie loading crew. It is a known fact that the loading of cross ties, unless properly supervised, is hazardous work. *Stone* v. *N. Y. & St. L. R. Co.*, 344 U. S. 407. The mere fact that the petitioner was injured while loading ties is proof of the hazardous nature of this work. Thus, the Respondent admits the need of a foreman to supervise a crew doing non-hazardous work, (setting cross-tie posts) but it seeks to convince this Court that none was necessary in the supervision of hazardous work. This, it is believed, is an admission of Respondent's neglect of its duty, and amounts to negligence.

5. The Respondent's brief (P. 28) admits that: "Sometimes, while the truck driver and one of the crew was shoving ties forward the other three men . . . would lift the ties from the ground to the truck". This is an admission that one member of the crew left and neglected his job, and that member is shown by the Record to be Petitioner's work buddy. The Petitioner's work load was doubled during the time his buddy was gone. This added burden was new and unusual and its imposition on Petitioner amounts to negligence.

6. Respondent in its brief admits that retina detachment is more likely to occur from the tightening of abdominal muscles "when one leans over to pick up a tie . . ." (P. 18 Res. brief). It was to avoid this very hazard of strain that safety tie tongs were designed, constructed and used by the Respondent. With the use of tie tongs a four man crew can lift a tie from a standing position (the handles project

upward) and while yet standing they can shove it endwise into the rear of a tilted truck bed. The requirement here that the Petitioner load ties by hand required him to bend and strain from the lift of every tie. This produced the abdominal and systemic strain and the consequent retina detachment. Thus, again, negligence is admitted.

PETITIONER NOT OBLIGATED TO OBTAIN OWN WORK TOOLS

Respondent has devoted much time in its brief in arguing that the Petitioner was personally obliged to select and use tie tongs, even though the foreman did not require the same. Such argument violates the great array of decided cases. *Walls* v. *McKinney*, 139 W. Va. 866, 81 S. E. 2d 901; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, and others cited in Petitioner's petition. To so hold would permit the invoking of the doctrines of assumption of risk and contributory negligence. These doctrines have been abolished by Statute in FELA cases and completely obliterated (Except mitigating damages by contributory negligence) by the many and repeated decisions of this Court. Thus, this part of respondent's brief should be rejected.

ONLY QUESTION, DID RESPONDENT'S NEGLIGENCE PLAY ANY PART HOWEVER SMALL, IN PETITIONER'S INJURY— AND IS THERE PROXIMATE CAUSE.

The decisions of this Court have repeatedly said that the inquiry in these cases (FELA) rarely present more than the single question whether the negligence of the employer played any part, however small, in the injury or death. This, therefore, is the only question before this Court. When both the medical and factual testimony is here considered, dis-

puted and conflicting facts are clearly apparent. This gave rise to a Jury question. The matter was submitted to the jury, not only for a general verdict, but upon Respondent's special Interrogatory. Both the general and the special verdict were in favor of the Petitioner, and against the Respondent. The verdicts are amply supported by competent evidence and should not be disturbed.

With the hope of now diminishing the effect of those two verdicts, the Respondent endeavors to present strained and unreal interpretations of the effect thereof. It seeks to diminish the effect of the jury's special verdict based upon its own propounded Interrogatory, by saying that the Interrogatory merely asks the jury if the tongs should be used at all (P. 14 Res. brief). Thus, it argues it should not be interpreted to inquire of the jury as to whether the failure to use tongs was negligence. The Supreme Court of Appeals of West Virginia accepted the Respondent's theory of this Interrogatory, and reversed the lower Court. This construction is strained and belies the real meaning and purpose of the Interrogatory. At the time this Interrogatory was propounded by Respondent, there was no question of its purpose. It hoped to obtain from the jury a decision that the failure to use tie tongs was not negligence. The opposite effect was obtained and the Respondent is now bound by a decision of its own asking.

The only way that causation or proximate cause can be proved, in a case involving an injury so technical as a detached retina, is by expert testimony—medical testimony. The Petitioner introduced Dr. Pinschmidt, an eminent eye specialist (see R. 95 for distinguished qualifications). This doctor was the petitioner's treating and operating physician and was intimately acquainted with the history and nature of the injury. He testified that the injured eye tissues were normal (R. 101). Had it not been, he would not have undertaken the eye operation (R. 107). Thus, there

was no pre-disposed condition that could have produced detachment, except the natural deterioration incident to age. The doctor testified that the lifting of the ties was the "only trauma that I could associate with any condition", (R. 112) and that he believes the lifting of the ties could have been the inciting cause of the injury. (R. 103). *The Respondent made no effort to dispute this testimony.* It must be taken at its full worth.

PETITIONER'S MEDICAL EVIDENCE MISINTERPRETED

In the Respondent's brief (P. 34, 35), it attempts to convince this Court that the Petitioner had flashes of light in his eye the night before the detached retina occurred. Respondent's argument is based on Dr. Pinschmidt's idea as to the time the injury occurred. The date of the injury was conclusively established by the Petitioner's diary, (Dec. 28, 1955) the production of which was required by the Respondent, (R. 158). The Doctor manifested his idea when attempting to interpret the history of the injury given to him by the patient. He said: "I frankly am not certain about the dates and I certainly would not want anything to hinge on them". (R. 109). Then again, he said: "That should be corrected". (R. 97).

The jury considered all the medical evidence, and the same argument as contained in the Respondent's brief was strenuously urged before the jury, and it found a verdict (both general and special) against the Respondent. Motions were made in the trial Court to set aside the verdicts, which motions (argued at length) were overruled. It is now urged that these jury verdicts should be permitted to stand.

The Petitioner's own testimony clearly and firmly indicates that he experienced no indications of eye injury prior

to the stress and strain of lifting a certain heavy tie during which he received his injury. (R. 55). It must be remembered that the Petitioner worked with a large detachment of the retina from the afternoon of the 28th of December through the 30th. The history given by the patient to his doctor could have referred to any one of these days.

RESPONDENT'S APPENDICES MISUSED

The Respondent carries in its brief an Appendix A, B, and C. When the content of these appendices are examined, it is found each is nothing more than the beginning of a new and supplemental brief. This, it is believed, is no more nor less than a subterfuge for the writing of three different briefs. It is felt that this is an imposition on the intelligence of this Court, and the Petitioner moves that the appendices be stricken from the brief and not considered. The purpose, no doubt, of this procedure is to obtain advantage of repetitious statements of the same thing, with the hope that this Court might be persuaded thereby.

INDUSTRIAL DECISIONS OF DETACHMENT OF RETINA NOT APPLICABLE

Under Appendix B of Respondent's brief are cited a number of industrial commission decisions as authority for its position here. These decisions, when read, clearly show that the only question involved is whether or not the injury received is within the language of Compensation Statutes. Of Course, negligence is never involved in any of them.

The first case cited is *R. G. Le Tourneau, Inc.*, v. *Ind. Comm.*, 396 Ill. 435, 72 N. E. 2d 183. When this case is read, it is found that the Industrial Commission made a finding of fact that the detached retina was not covered by the Work-

men's Compensation Statute and the Appellate Court refused to reverse. This is, in fact, an authority for the Petitioner here. The jury in the case at Bar made a finding of fact on Respondent's negligence and the same should not have been disturbed by the West Virginia Appellate Court.

The next case cited is *Industrial Commission of Ohio* v. *Auler*, 49 Ohio App. 12, 194 N. E. 887. When this case is examined it is found that it too is inapplicable. The Court, in quoting from *Industrial Commission* v. *Franken*, 126 Ohio St. 299, 185 N. E. 199, held "impairment of physical condition accruing from constant and continued labor no matter how heavy or arduous, is not covered by Workmen's Compensation Law. Such impairment does not come within the meaning of the term 'injury' ". It is therefore submitted that these industrial commission cases by their very nature, cannot be considered as authority in the case at Bar.

CONCLUSION

In conclusion, it is respectfully submitted that the facts of the present case as well as the law applicable thereto were fully and clearly presented to the jury. The case was defended by able counsel; counsel for the defendant was given the opportunity to argue his facts before the jury on all questions concerning the case, and it is inconceivable that counsel for the Respondent could complain of anything except that the jury failed to believe Respondent's version of the case. Facts are hard things to controvert, and it is respectfully submitted if this case were decided on the reasons given by the Respondent or the Supreme Court of West Virginia without regard to the facts as they actually exist in this case, judges would be substituted for juries. In this case there is a sufficient conflict in fact and also sufficient inferences and uncertainties in facts proven that the resolu-

tion of same was a subject exclusively for determination by the jury.

Respectfully submitted,

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Dated September 25, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

VS.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of October 12, 1959, denying the petition for Writ of Certiorari U.S. , and that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in the above entitled case, as prayed for in the petition filed June 23, 1959, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. The Brief of the Respondent in Opposition to Petitioner's Petition for Writ of Certiorari urges only one single point which is erroneous and was not adequately urged by the petitioner in his Petition or his Reply Brief.

On page 23 of the Brief of Respondent in Opposition to Petition for Writ of Certiorari, we take the liberty to quote from the opposing Brief on page 23:

> "It is the sole theory of petitioner Crookham that he had the detachment of the retina when he had the burning sensation, like sweat in his eye, after loading the second load of ties. His doctors say that such a burning sensation or pain was not produced by the separation of retina, for pain-wise one does not know when the retina separates. Take this alleged incident out of the case and petitioner does not have the least conjecture when the detachment occurred. There is no competent evidence as to when the retina detached."

In this connection also is quoted from the opinion of the Supreme Court of Appeals of West Virginia that "the only direct evidence * * * pointing to * * * plaintiff's injuries is his own statement."

It is believed that the foregoing statements had much to do with the denial of the petition for writ of certiorari and that there are substantial grounds available to the petitioner not previously presented in argument and are here urged, or at best it can be said that the grounds here urged were not adequately presented to the Court in the original petition of June 23, 1959.

A review of the record not only indicated that the petitioners direct evidence sustains his petition that his injury was sustained by lifting cross ties but that there are other witnesses who corroborate this testimony. The statement by the petitioner that the "pain" or burning sensation, taken from the case, does not leave the petitioner with any conjecture when the detachment occurred is incorrect. The Record on page 55, is as follows:

"A. I started to lift a tie. I reached down got it. It was a heavy one, a real heavy tie; I lifted it up. It just felt like salt in my eye. It wasn't a sharp pain—just a kind of burning sensation. When Ed comes around we took some time. I took my gloves off and wiped my glasses.

Q. Did you ask permission to do this?

A. Mr. Sayre said, 'Ray, your eyes is awful red.' I said I felt pretty good though I wanted to wipe my eyes.

Q. What, if anything, did you notice with reference to your vision after you felt the burning sensation?

A. *It was just like it was blurred, like scum* on my eye." (underscoring ours).

After the blurring sensation, Crookham lined up fence posts, and his eye continued to water, and in attempting to set fence posts, a fellow employee, Mr. Hayes, instructed Crookham to sight fence posts and get them in line, but Crookham, after being told by the witness, Hayes, that the posts were "leaning way over", called the foreman, Whittington, and asked that he sight the posts for Crookham, and Crookham explained to the foreman that the reason why he could not sight the posts was because of the injury to his eye, which had previously and immediately occurred during the loading of the ties. (R. 56-57).

This blurring condition continued to exist through the following day and until Crookham, the petitioner was compelled to see a doctor. The blurring of vision is corroborated by the foreman, Whittington (R. 229-230):

"Q. Do you know whether or not he [Crookham] was sighting posts?

A. Yes, he told me he was.

Q. Did he ask you to help sight the post?

A. That is right.

Q. Did he tell you something was wrong with his eye?

A. He believed he had some dirt in his eye.

Q. Wanted you to look and see if some were straight?

A. That is right.

Q. And you lined the post up for him?

A. That is right."

The blurring of vision is also corroborated by the fellow-workman, Hayes (R. 155):

"'A. As well as I remember, Mr. Crookham came back to help me. I were already there and he came back from loading ties, in the evening. It was getting up half-way in the afternoon, something like that, maybe later, wasn't too long until quitting time. Me and Mr. Crookham told you, we took ties over for some posts. Some had been cut off around a foot and we took them over to a hole which had been dug in the fence line. We took them and put them in the holes in the fence line and he held the posts and maybe I told Mr. Crookham to see if the posts were in line with the line we were building the fence on and he made mention that he got something in his eye, or something to that effect, and asked somebody else to line the ties in the fence row because that he couldn't see to line them and he called Mr. Jülkert or Mr. Whittington and told them for one or the other of them to look at the line, for he couldn't see as good as he had been.

Q. To the best of your recollection that was the time that you were loading ties on Mr. Sayre's truck?

A. If I am not mistaken, it was on the same day."

Therefore, the statement in the Brief of the Respondent in Opposition to Petition for Writ of Certiorari is absolutely incorrect, as well as the decision on the point in question by the Supreme Court of Appeals of West Virginia.

2. There are substantial grounds available to the petitioner although not previously presented and there are other grounds of argument here urged which were not adequately presented to the Court in the original petition of June 23, 1959.

It is respectfully submitted with all deference to this Honorable Court that it did not consider all the facts on the questions of causation, nor did the petitioners adequately urge arguments which should be presented. It is believed that the law today as laid down by the Supreme Court of the United States, is the same as it was on the day the original petition was presented. Those cases in support of this petition have already been cited in the Brief, the Petition and the Reply Brief of the Petitioner. It is also urged that the findings of the Trial Court, both during the trial of the case and on a special hearing set before the Trial Court and argued at length on a motion by the respondent for a new trial, were not sufficiently urged in the petitioner's Petition and Brief. It is believed that the Supreme Court of Appeals of West Virginia took out of context the medical doctor's statement that "no pain" would be occasioned at the moment the retina of Crookham's eye became detached, and did not take into consideration all the medical testimony.

The Supreme Court of West Virginia was of the opinion that the injury might have occurred at another time. There is ample evidence that injury to the Petitioner occurred and did occur while he was engaged in lifting railroad ties. Dr. Pensmidt, the treating physician, as well as Dr. Humphries, gave testimony that the trauma sustained by Crookham while lifting cross ties was the competent producing cause of the detached retina. This testimony in all respects is in line with introduction of evidence and was not a mere inference of opinion but left the question to the province of the jury of whether or not the specific trauma was competent to produce that particular injury. It is to be noted in the testimony of Dr. Pensmidt (the same can be said of Dr. Humphries testimony also) that he found the tissues of both eyes normal and of the same nature, degenerated only in consistency with Crookham's age. The first inquiry as to whether the trauma was competent to inflict some harm which would affect the course of the underlying process in the organs involved was most important. Something must be added or taken away from what existed before. Medically the jury found the lifting of the ties affected the then existing physiological structure involved in the disability, the detachment of the retina then, was not coincidental and was causally connected with the disability. Crookham suffered from nothing but the normal degeneration consistent with his age. All of the medical testimony concerning the lifting of the cross ties was that the same was the competent producing cause of the detachment of Crookham's retina. The weight of the evidence was left to the jury. That was the disability before the Court. The jury decided on the medical evidence before it, that lifting of the cross ties was the competent producing cause of the detachment of Crookham's retina. (R. 95-

116; 236-253). In effect, Crookham was saying, through his doctor, to the jury, "This is what I was. Look at me as I am now. Whatever was underlying in me was dormant, the defendant's action caused the injury. It was quiet and you brought it to life. By what right did you destroy the balance of nature and health at my age and plunge me into the misery of my disability." We believe the Court ignored the question of the precipitating factor in its decision and invaded the province of the jury which invasion is contrary to the established rule in West Virginia.

Bowen v. *Huntington*, 35 W. Va. 682.
Barker v. *Ohio River R.R. Co.*, 51 W. Va. 423."

3. The question continues to be one of large practical importance in the administration of the Federal Employers Liability Act with reference to injuries to railroad workers throughout the entire country involving far more substantial sums of money than involved in the instant case. The denial of certiorari now stands not only in the State of West Virginia, but in all jurisdictions on the Federal Employers Liability Act, that a State Court can substitute its own judgment for that of a jury where both a special and general verdict were given by the jury to an injured employee in a case where negligence obviously exists. The reported West Virginia decision being now a reported case as reported in 107 S. E. 2d 516; and by having certiorari denied by the Supreme Court of the United States of America approves and now places on record trial only by appellate court, thus abrogating the function and purpose of a jury trial and trial judge which are so vitally important to the preservation of liberty and justice to not only those covered by the Federal Employers Liability Act but also each individual

citizen in this country in that the decision overrules the findings of fact by the jury and trial court.

Mr. Justice Douglas states that "The right to trial by jury is a basic and a fundamental feature of our system of federal jurisprudence and part and parcel of the remedy afforded railroad workers, and that to deprive workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress afforded them."

The decision of the West Virginia Supreme Court of Appeals places a premium upon injuries to elder railroad employees and leaves all the law decided by the Supreme Court of the United States in such state of chaos that certiorari should be considered in this case. The sum of money involved although small here, is not controlling, there are many cases in the Federal District Courts and Courts of Appeal, and perhaps in this very Court that involve the same question here presented but involve much larger sums of money.

If the decision of the Supreme Court of Appeals of West Virginia in this case is permitted to stand it will strike terror into the hearts and lives of all injured railroad employees in West Virginia. Chaos and confusion as to what the law is in this state under FELA will be the inevitable result. That opinion is strikingly contrary to the case of *Pritt* v. *W. Va. Northern R. Co.*, 132 W. Va. 184, 51 S. E. 2d 105 (FELA case). It was in conformity to the opinion in the *Pritt* case, that the case at Bar was prepared and tried. It was thought that the rule of the *Pritt* case was the rule of this state as *this* Court denied certiorari. 336 U. S. 961. 93 L. Ed. 1113.

The *Pritt* case holds that if the question of fact is such that "different men might reach different conclusions,"

the jury verdict should not be disturbed. In this case the judges of the Supreme Court of Appeals of West Virginia did differ with both a jury of twelve men and an eminent trial jugde. Thus, "different men" did reach "different conclusions". Had there been a verdict for the Respondent in the Trial Court, and had the trial judge entered judgment on the verdict, then there would have been no difference of opinion. But here, there being a verdict for the Petitioner based on a "difference of opinion" the rule in the *Pritt* case was complied with and the jury's verdict should not be disturbed. The long and distinguished record of this Court will not permit a state to conflictingly construe a Federal Statute, to the everlasting destruction of those who toil by the sweat of their brow. There can be no question about the facts of this case meeting the test of "different men might reach different conclusions". Twelve jurors—twelve officers of the trial Court—found liability due to negligence. A trial judge—out of the experience of thirty years f continuous law practice—affirmed that jury, in both a special and a general verdict. Men in this case have differed. We have met the test of the *Pritt* case, which presumably was sanctioned by this Court. Now we ask at your hands, that the yardstick of that case be used here—used in the interest of an old, broken down, tired employee, an employee who gave thirty years of his life to the Respondent. This Court and his God are now his only hope. May his trust be well placed and his prayers answered.

The only possible difference between the *Pritt* case and this case is that in the former, an order was given while in the latter there was a failure to give any order. One is a wrong of commission, the other is a wrong of omission. Is there any substantial difference in the two? There is just as much duty to act to *prevent* injury as

there is to act to bring it about. The jury accepted this theory of the case, and since men have differed about the whole matter, the jury verdict should not be disturbed.

4. It is also urged that, based on procedure of the State of West Virginia, if certiorari is denied in this case, it shall go back to the Circuit Court of Mason County, West Virginia, to be re-tried and may again find its way to this Court. While sentiment has no place in matters before this Honorable Court, it is nevertheless, urged that such expense for the ordinary railroad working man deprives him of those rights which are guaranteed by our Constitution because of his impecuniary position, a position that is common to a majority of the people who are forced to labor with their hands, and particularly to that group of aged railroad employees who must and do work at the age of 60 under the constant fear of insecurity, due to aging conditions of their bodies and the possible disaster of losing their jobs because of their increased age and worse yet, because of injury without compensation due to their financial inability to assert their rights in the courts because of their impecunious position.

5. We believe there is error in the conclusion that there was a complete absence of any evidence of negligence in this case. Attention here is directed to the fact that nowhere did Petitioner by his own testimony foreclose any inference of lack or absence of negligence; to the contrary, there was ample evidence adduced to sustain the evidence of negligence and to justify the jury in finding a verdict for the plaintiff.

It is also believed that the Supreme Court of the United States of America should not elect to affect a change in the decisions heretofore rendered by it on the Federal Employers Liability Act by letting stand the decision of the West Virginia Supreme Court of Appeals.

CONCLUSION

For the reasons set forth above and in the petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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Counsel for Petitioner

Dated: Nov 3, 1959

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

E. Franklin Pauley
Counsel for Petitioner